TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 459. 217.

W. P. H. McFADDIN IN HIS OWN RIGHT AND W. F. H. McFADDIN AND JAMES A. McFADDIN, EXECUTORS OF WILLIAM McFADDIN, DECEASED, PLAINTIFFS IN ERROR,

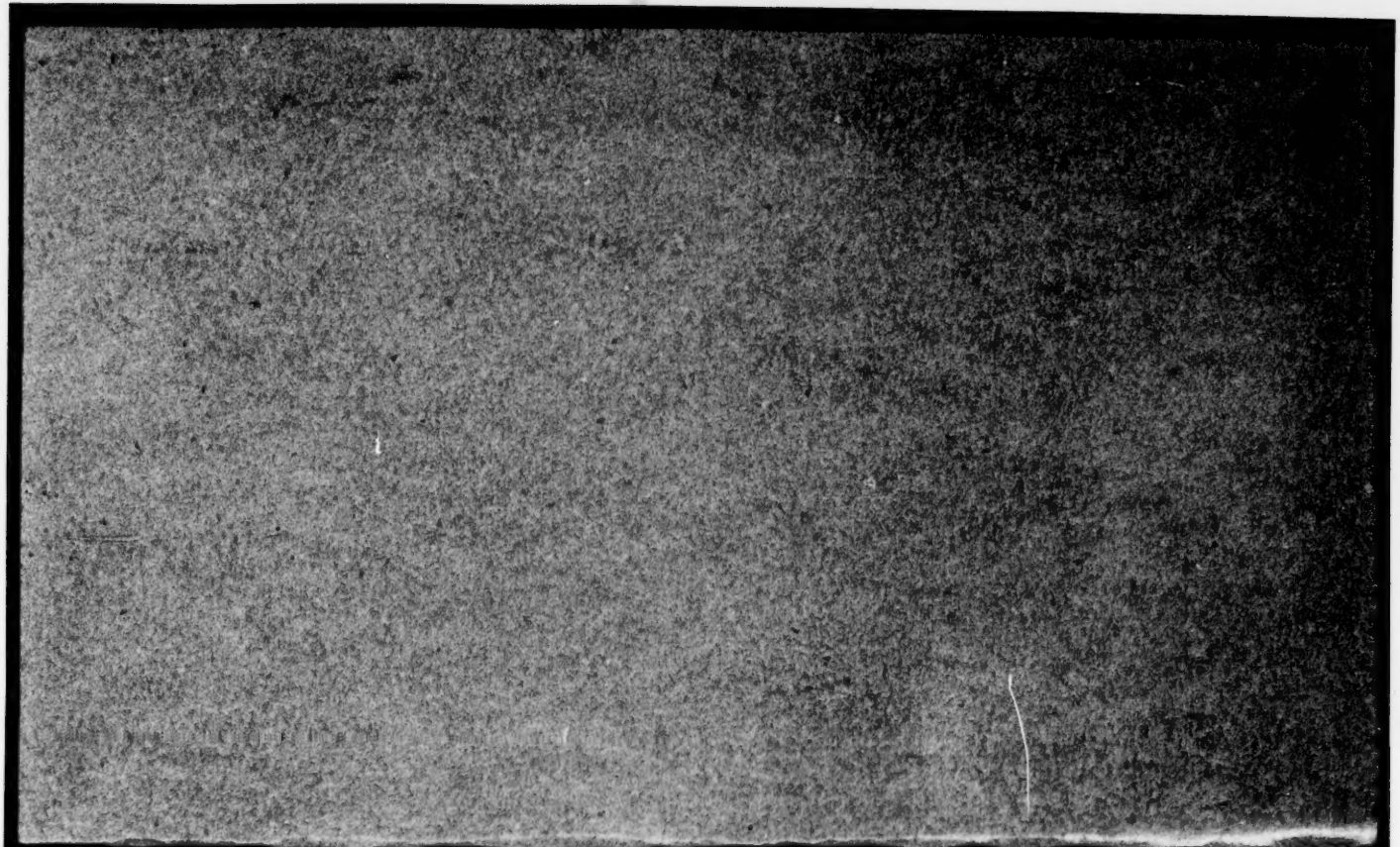
vs.

EVANS-SNIDER-BUEL COMPANY, C. W. TURNER, H. S. SPALDING, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED DECEMBER 21, 1900.

(18,005.)



(18,005.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 520.

W. P. H. McFADDIN IN HIS OWN RIGHT AND W. P. H. McFADDIN AND JAMES A. McFADDIN, EXECUTORS OF WILLIAM McFADDIN, DECEASED, PLAINTIFFS IN ERROR,

vs.

EVANS-SNIDER-BUEL COMPANY, C. W. TURNER, H. B. SPALDING, ET AL.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1900, of said court, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday in May, to wit, the seventh day of May, A. D. 1900, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the twentieth day of February, A. D. 1900, a transcript of record, pursuant to a writ of error directed to the United States court of appeals in the Indian Territory, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein Evans-Snider-Buel Company and others were plaintiffs in error, and W. P. McFadden and others were defendants in error; which said transcript of record is in the words and figures following, to wit:

EVANS-SNIDER BUEL COMPANY, C. W. Turner, H. B. Spaul-ing, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, Plaintiffs in Error, *versus* W. P. H. MCFADDEN in His Own Right and W. P. H. McFadden and James A. McFadden, Executors of William McFadden, Deceased, Defendants in Error.	No. 250.	Writ of Error.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable chief justice and judge of the United States court of appeals for the Indian Territory, Greeting:

Because, in the records and proceedings, as also in the rendition of judgment of a plea which is in the said United States court of appeals for the Indian Territory, before you at the January term, 1900 thereof, between W. P. H. McFadden, in his own right, and W. P. H. McFadden and James A. McFadden, executors of William McFadden, deceased, appellants, and Evans-Snider Buel Company, and C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel and Chester A. Snider, sureties, appellees, manifest error hath happened, to the great damage of Evans-Snider Buel Company, appellees, and its sureties aforesaid, as by their com-

plaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then, under your seal, definitely and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have said records and proceedings aforesaid at the city of St. Louis, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, within sixty days from this date, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein
b to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 13 day of January, in the year of our Lord, nineteen hundred. Issued at office in South McAlester, Indian Territory, with seal of the United States court of appeals for the Indian Territory, and the date as aforesaid.

Seal United States Court of Appeals in the Indian Territory.

WM. P. FREEMAN,
Clerk United States Court of Appeals for the Indian Territory.

Allowed:
WM. H. H. CLAYTON,
Justice of the United States Court of Appeals for the Indian Territory.

Filed January 13th, 1900.
WM. P. FREEMAN, *Clerk.*

UNITED STATES OF AMERICA, *Indian Territory,* } ss:

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

Seal United States Court of Appeals in the Indian Territory.

In witness whereof, I (*have to*) subscribe my name and affix the seal of the United States court of appeals in the Indian Territory, at office in the city of South McAlester, this 17th day of February, A. D. 1900.

WM. P. FREEMAN,
Clerk United States Court of Appeals in the Indian Territory.

The United States of America to W. P. McFadden in his own right and W. P. H. McFadden and James A. McFadden, executors of William McFadden, deceased. Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the United States court of appeals in the Indian Territory, wherein Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William H. H. Clayton, chief justice of the United States circuit court of appeals in the Indian Territory, this sixth day of February, in the year of our Lord one thousand nine hundred.

WM. H. H. CLAYTON,
Chief Justice of the United States Court of Appeals in the Indian Territory.

Service accepted this 10th day of Feb'y, 1900.
WILLIAM T. HUTCHINGS,
Att'y for Def'ts in Error.

No. —. United States circuit court of appeals, eighth circuit. Evans-Snider-Buel Company *et al.*, plaintiffs in error, *vs.* W. P. H. McFadden *et al.*, defendants in error. Citation on writ of error. Filed 14th day of February, 1900. Wm. P. Freeman, clerk.

UNITED STATES OF AMERICA, *Indian Territory,* } ss:

In the Court of Appeals.

Pleas and proceedings in the United States court of appeals in the Indian Territory, at the city of South McAlester, before the Honorable William H. H. Clayton, chief justice, and the Honorable John R. Thomas, Hosea Townsend, and Joseph A. Gill, associate justices.
WILLIAM P. FREEMAN, *Clerk.*

W. P. H. MCFADDEN ET AL., Appellants,
versus
JOHN R. BLOCKER ET AL., Appellees.

Be it remembered, that heretofore, to wit, on the 3rd day of June, A. D. 1899, there was filed in the office of the clerk of the United States court of appeals in the Indian Territory, a transcript of the United States court for the northern district of the Indian Territory, at Wagoner, in the above cause, which is in the words and figures following, to wit:

1 UNITED STATES OF AMERICA, } ss:
Indian Territory, Northern Judicial District, }

Pleas in the United States court for the northern district of the Indian Territory, at Wagoner, in the cause numbered 251 and entitled William McFaddin & Son, plaintiff-, and J. R. Blocker and other-, defendants.

Honorable William M. Springer, judge of said court.

On the 17th day of June, A. D. 1896, there *was* filed in the office of the clerk of said court, at Muskogee, the complaint, affidavit, and bond for attachment in the above numbered and entitled cause, and on the same day there was issued by said clerk of said court the writ of attachment with summons in said cause, which said writ of attachment and summons with the return of the marshal of said court duly endorsed thereon will be found on page — to page — of this transcript.

At a regular term of the United States court for the northern district of the Indian Territory, begun and held at the court-rooms at the town of Muskogee, in said Territory, and on the first day of December A. D. 1896.

Present: Honorable William M. Springer, judge of said court.

On the 12th day of December, A. D. 1896, the same being one of the regular days of said term of court, among the proceedings had was the following, to wit:

WM. McFADDIN & SON }
vs.
J. R. BLOCKER ET AL. }

Interplea of Evans, Snyder Buel Co. Filed.

Said interplea is in words and figures as follows, to wit.

In the United States Court in the Indian Territory, Northern District, at Muskogee.

WM. McFADDIN & SON, Plaintiffs, }
vs.
JAMES W. TAYLOR ET AL., Defendants. }

Interplea and affidavit.

Comes now Evans, Snyder Buel Company, a corporation organized under the laws of the State of Illinois, and represents
2 that it is the owner and entitled to the possession of the following-described cattle now in pastures near Summit, Indian Territory. 6,775 head of cattle, of which 5,140 are three and four year old steers and 1,635 are cows. Said cattle are branded as follows: 820 head of steers branded 7S on left side, 1,653 head of steers branded on left side, 922 head of steers branded O K on right side, 515 head of steers branded on hip and side, 187 head

head of steers branded 77 on left side, 320 head of steers branded on left side, 198 head of steers branded on left side, 525 head of steers branded R or M on left side, 205 head of cows branded H S — on left side, 260 head of cows branded on left side, 1,170 head of cows branded Ta on left side.

That said property has been levied on as the property of J. R. Blocker by virtue of an attachment issued in this cause, dated June 17, 1896, wherein Wm. McFaddin & Son are plaintiffs and James W. Taylor *et al.* are defendants, which cause is now pending in said court.

MARCUM, FEARS & OWEN,
Att'ys for Defendants.

Now comes S. S. Fears as agent of Evans, Snyder Buel Company and on oath states that the allegations in the foregoing interplea and affidavit are true as he verily believes.

S. S. FEARS, *Agent.*

Subscribed and sworn to before me this 12th day of December, 1896.

MYRTA L. EDDLEMAN.

Endorsed: "Filed Dec. 12, 1896. Jas. A. Winston, clerk."

Thereafterwards, to wit: and on the 27th day of January, A. D. 1897, the same being one of the regular days of said term of said court, among the proceedings had was the following, to wit:

WM. MCFADDIN & SON
vs.
J. R. BLOCKER ET AL.

Interplea of Evans, Snyder Buel Co. Filed.

Said interplea is in words and figures as follows, to wit:

In the United States Court in the Indian Territory, Northern District.

WM. MCFADDIN & SON
vs.
J. R. BLOCKER ET AL.

Interplea.

3 Now comes Evans, Snyder Buel Company, a corporation organized under the laws of Illinois, and for its interplea says:

That it is the owner of and claims six thousand four hundred and seventy-five head of cattle levied on by virtue of an attachment in favor of Wm. McFaddin & Sons *vs.* J. R. Blocker *et al.*, on June 29th, 1896, in said northern district by S. M. Rutherford, marshal of said district, after which levy interpleader claimed said cattle under oath, and gave bond as interpleader, as required by law, which was on

the 14th day of July, 1896, approved by said marshal and said cattle left with the interpleader. Interpleader further says that said cattle were not subject to levy as the property of J. R. Blocker or as the property of any of the other defendants named in said writ of attachment.

Wherefore, interpleader prays for a judgment against plaintiffs and establishing its claim to said cattle for two thousand dollars damages.

MARCUM, FEARS & OWEN,
STUART, GORDON & HAILEY,
Att'ys for Interpleader.

Endorsed: "Filed in open court Jan. 27, 1896. Jas. A. Winston, clerk."

Thereafter, to wit, on January 29th, 1897, the same being one of the regular days of said term of said court, judgment by default was entered in said case against the defendant, J. R. Blocker, and in favor of the plaintiffs, for $55,875.71, and judgment sustaining the attachment was also entered in said cause, and the venue of this case was changed to this court sitting at Tahlequah on motion of the plaintiffs. A full account of these proceedings had in said court will be found on pages — to — of this transcript.

And thereafterwards, to wit, on the 13th day of February, 1897, the following order was made and entered of record, to wit:

WM. MCFADDIN & SON
vs.
J. R. BLOCKER ET AL.

Order transferring case to Tahlequah set aside.

And thereafterwards, to wit, on the 2nd day of April, 1897, the same being one of the regular days of said term of said court, among the proceedings had was the following, to wit:

WM. MCFADDIN & SON
vs.
J. R. BLOCKER ET AL.

4 On motion of plaintiffs, it is ordered that this cause be, and the same is hereby, transferred to this court at Tahlequah; it is therefore ordered that the clerk of this court at Muskogee transmit to the clerk of this court at Tahlequah all papers together with a transcript of the proceedings in said cause.

At a regular term of the United States court for the northern district of the Indian Territory, at Tahlequah, begun and held on the 13th day of April, A. D. 1897.

Present: Honorable William M. Springer, judge of said court.

On April 20th, 1897, the same being one of the regular days of said term of said court, among the proceedings had was the following, to wit:

WM. MCFADDIN & SON
vs.
J. R. BLOCKER, Defendant; EVANS-SNYDER-BUEL COMPANY, Interpleaders. } No. 142.

On this day the plaintiffs file their answer to the interplea of the Evans-Snyder-Buell Company.

Said answer to interplea is in words and figures as follows, to wit:

In the United States Court, Northern District of the Indian Territory, at Tahlequah.

WM. MCFADDIN & SON
vs.
JAMES W. TAYLOR ET AL. } Answer to Interplea.

Now comes Wm. McFaddin & Son and for answer to the interplea of Evans, Snyder & Buel Company filed herein say:

That they deny that Evans, Snyder & Buel Company are the owners of or entitled to the possession of the cattle levied upon by the marshal under the writ of attachment in this cause and described in said interplea, but plaintiffs allege that said cattle were at the time of said levy the property of the defendant, J. R. Blocker, and that plaintiffs *is* entitled to the same under their attachment.

Wherefore plaintiffs ask that Evans, Snyder & Buel Company take nothing by their said interplea, and that the cattle levied upon be adjudged to plaintiffs to satisfy their debt and costs and for all proper relief.

R. A. GREER,
HUTCHINGS & ENGLISH,
THOMPSON & HASTINGS,
MAXEY & CLAYTON,
Att'ys for Plaintiffs.

5 Endorsed: "Filed in open court Apr. 20, 1897. James A. Winston, clerk."

Thereafterwards, to wit: and on the same day the following further proceedings were had in said cause, to wit:

WM. MCFADDIN & SON
vs.
J. R. BLOCKER, Defendant; EVANS, SNYDER-BUEL COMPANY, Interpleaders.

Now on this day this cause comes on to be heard on the issues of the interplea of the Evans-Snyder-Buel Company; and the plaintiffs and the defendants appear by their attorneys and announce ready for trial; and thereupon come the following jury from the regular panel, to wit: Paul Rogers, John French, Ross Daniels, Thomas Rider, Frank Adair, Benjamin Goss, John Carlile, Rush Wilson, H. B. Smith, Tom Hayden, Frank Howard and Andy Aikin, who were tried, found qualified, chosen and sworn.

Thereafterwards, to wit: and on April 21, 1897, the same being one of the regular days of said term of said court, among the proceedings had were the following, to wit:

Wm. McFaddin & Son
vs.
J. R. Blocker, Defendant; Evans, Snyder-Buel Company, Interpleaders. } No. 142.

This cause this day coming on to be heard, both parties appearing by attorneys, answered ready for trial; and a jury of good and lawful men being duly empaneled and sworn to try the issues submitted to them in this cause, and said jury having heard the testimony, argument of counsel and charge of the court, returned the following verdict:

"We, the jury, find the issues of law and fact in favor of the interpleaders, Evans-Snyder-Buel Company.
(Signed) FRANK HOWARD, *Foreman.*"

It is therefore considered, ordered and adjudged that the interpleaders, Evans-Snyder-Buell Company, do have and recover of the plaintiffs, Wm. McFaddin & Son, and the defendant, J. R. Blocker, the property levied upon by virtue of the attachment in this cause, and described in the officer's return and the interplea herein, and all costs in this behalf expended, for which let execution issue.

Thereafterwards and on the same day, the following further proceedings were had, to wit:

Wm. McFaddin & Son
vs.
J. R. Blocker, Defendant; Evans-Snyder-Buell Company, Interpleaders. } No. 142.

6 And now comes plaintiffs, Wm. McFaddin & Son, and by their attorney file their motion for a new trial of this cause, and the court being well and sufficiently advised doth overrule said motion, to which ruling plaintiffs except, and their exceptions are now here noted of record.

Whereupon plaintiffs pray an appeal and the court doth grant said prayer; and it is ordered and adjudged by the court here that the plaintiffs be and they are hereby allowed an appeal from the judgment herein rendered at the present term of this court, to the United States court of appeals for Indian Territory, and that plaintiffs aforesaid be allowed thirty days in which to file their bill of exceptions.

Mandate of the Court of Appeals for the Indian Territory Reversing the Judgment of the Lower Court in said Cause.

UNITED STATES OF AMERICA, } *set:*
Indian Territory, }

No. 129.

In the Court of Appeals.

Be it remembered, that at a term of the court of appeals in the Indian Territory begun and held at the court-house in the city of South McAlester, on the third day, being the first Tuesday of January, A. D. 1899, amongst others, were the following proceedings, to wit:

On the 13th day of January, A. D. 1899, a day of said term:

WM. MCFADDIN & SON, Appellants,
vs.
J. R. BLOCKER ET AL., Defendants; EVANS, SNYDER-BUEL COMPANY, Interpleaders, Appellees.

Appeal from the Court of the Northern District of the Indian Territory.

This cause came on to be heard upon the transcript of the record of the court for the northern district of the Indian Territory, and was argued by counsel; on consideration whereof it is the opinion of the court that there is error in the proceedings and judgment of said court for the northern district in this cause is this: The court below erred in holding the lien of the mortgages introduced in evidence superior to the attachment herein.

It is therefore considered by the court that the judgment of said court for the northern district in this cause rendered be, and the same is hereby for the error aforesaid, reversed, annulled, and set aside with costs; and that this cause be remanded to said
7 court for the northern district for further proceedings to be therein had according to law, and not inconsistent with the opinion herein delivered.

It is further considered that said appellants recover of said appellees all their costs in this court in this cause expended, and have execution thereof

In testimony that the above is a true copy of the judgment of said court of appeals, rendered in the case therein stated, I, Wm. P. Freeman, clerk of said court of appeals, hereunto set my hand and affix the seal of said court of appeals, at my office in the city of South McAlester, this 13th day of February, A. D. 1899.

[SEAL.] (Signed) WM. P. FREEMAN, *Clerk.*

Said mandate being filed in this court at Tahlequah on the 23d day of February, 1899.

Thereafterwards, to wit, on the 10th day of April, 1899, the following proceedings were had:

Copy of Order of Court.

UNITED STATES OF AMERICA, } ss:
Indian Territory, Northern District, }

In the United States court in the Indian Territory, northern district, at a term thereof begun and held at Tahlequah, in the Indian Territory, on the 10th day of April, A. D. 1899.

Present: The Honorable John R. Thomas, judge of said court.

The following order was made and entered of record, to wit: On the 10th day of April, 1899, the same being a day of the regular April term, 1899, of said court, the following proceedings, among others, were had:

WM. MCFADDIN & SONS }
vs. } 142. Law.
J. R. BLOCKER ET ALS. }

Come now interpleaders herein and file their petition for change of venue; and, the court, being sufficiently advised, allows change of venue to Wagoner, Indian Territory. And it is ordered by the court that the clerk of this court transmit, without delay, to the clerk of this court at Wagoner, Indian Territory, all the papers in this case, together with a complete transcript of the proceedings had herein, there to be docketed for trial at the next term of said court.

8 And on the 12th day of April, 1899, the same being a day of said April term, 1899, of said court, among other proceedings, the following were had:

WM. MCFADDIN & SONS }
vs. } 142. Law.
J. R. BLOCKER ET ALS. }

It is ordered by the court that the mandate of the United States court of appeals for the Indian Territory, be spread of record, and said mandate is herein spread of record in the following words and figures, to wit:

No. 129. Form No. 5.

Be it remembered, that at a term of the court of appeals in the Indian Territory begun and held at the court-house in the city of South McAlester, on the third day, being the first Tuesday of January, A. D. 1899, amongst others, were the following proceedings, to wit:

On the 13th day of January, A. D. 1899, a day of said term:

WILLIAM MCFADDEN & SON, Appellants,
vs.
JOHN R. BLOCKER ET AL., Defendants; EVANS-SNYDER-BUELL, Interpleaders, Appellees.

Appeal from the Court of the Northern District of the Indian Territory.

This cause came on to be heard upon the transcript of the record of the court for the northern district of the Indian Territory, and was argued by counsel; on consideration whereof it is the opinion of the court that there is error in the proceedings and judgment of said court for the northern district in this cause, is this: The court below erred in holding the lien of the mortgages introduced in evidence superior to the attachment herein.

It is therefore considered by the court that the judgment of said court for the northern district in this cause rendered be, and the same is hereby for the error aforesaid, reversed, annulled, and set aside with costs, and this cause be remanded to said court for the northern district for further proceedings to be therein had according to law, and not inconsistent with the opinion herein delivered.

It is further considered that the said appellants recover of said appellees all their costs in this court in this cause expended, and have execution therefor.

In testimony that the above is a true copy of the judgment of said court of appeals, rendered in the case therein stated, I,
9 Wm. P. Freeman, clerk of said court of appeals, hereunto set my hand and affix the seal of said court of appeals, in the city of South McAlester, this 13th day of February, A. D. 1899.

WM. P. FREEMAN, *Clerk.*

Endorsed on the back: "Filed Feb. 23, 1899. Jas. A. Winston, clerk."

UNITED STATES OF AMERICA, } ss:
Indian Territory, Northern District, }

I, James A. Winston, clerk of the district court of the United States for the northern district of the Indian Territory, do hereby certify the foregoing to be a true copy of an order made by said court now on file in my office.

In testimony whereof I have hereunto set my hand, at my office in Tahlequah, in said district, this 29th day of April, A. D. 1899.

JAMES A. WINSTON, *Clerk,*
By H. W. C. SHELTON, *Deputy.*

Now on this 12th day of May, 1899, comes counsel for plaintiffs and suggests the death of the plaintiff William McFadden, and asks that this action as to him be revived in the name of his executors, William P. H. McFadden and James A. McFadden, which is allowed by the court, and said action revived accordingly, and said parties are made plaintiffs in this case, and counsel for plaintiffs in open court enter the appearance of said executors.

In the United States Court for the Northern District of the Indian Territory, Sitting at Wagoner, March Term, 1899.

WILLIAM MCFADDEN & SON, Plaintiffs,
vs.
JOHN R. BLOCKER ET AL., Defendants, with EVANS-SNYDER-BUEL COMPANY, Interpleaders. } No. 251.

Bill of Exceptions.

Be it remembered, that the above numbered and entitled cause being called for trial at the regular March term, A. D. 1899, of the United States court for the northern district of the Indian Territory, begun and held at the Federal court building, in the town of Wagoner, in said district and Territory, and on the 13th day of May, A. D. 1899, the same being one of the days of the said regular March, A. D. 1899, term of said court, William F. Hutchings, Maxey & Clayton, and R. A. Greer appeared as attorneys for the plaintiffs, and Charles B. Stuart, H. M. Pollard, Thomas Marcum, and S. S. Fears appeared as attorneys for the interpleaders, and the following proceedings were had in said cause, to wit:

Whereupon all parties announced ready and a jury of twelve good and lawful men was duly empaneled and sworn to try this cause, and all the witnesses both for plaintiffs and interpleaders were called and sworn and put under the rule.

And the plaintiffs herein having heretofore obtained judgment against defendants, it appears that the affirmative in this case is upon the interpleader-, and thereupon Charles B. Stuart, Esquire, made opening statements to the jury on the behalf of the interpleader-, and was following by Mr. W. T. Hutchings on behalf of the plaintiffs.

Whereupon the interpleader-, to sustain the issues on *its* part, offered evidence as follows, to wit:

Mr. POLLARD: We offer in evidence chattel mortgage dated April 23, 1896, from John R. Blocker to H. M. Pollard, trustee for Evans, Snyder-Buel Company, covering 6,250 head of cattle, together with the notes mentioned therein. Said mortgage was made on the 23d day of April, 1896, by Mr. Blocker, a resident of Bexar county, in the State of Texas, and it is to secure certain notes mentioned therein, aggregating $122,184.62, made on 6,250 head of cattle, which are a portion of those levied upon, the mortgage was recorded in Bexar county, Texas, on the 24th day of April, 1896, and in the northern district of the Indian Territory, at Muskogee, on the 27th day of April, 1896.

Mr. HUTCHINGS: Plaintiffs object to the introduction of this mortgage, because it shows on its face that it was given on cattle situated in the State of Texas; that it was recorded in the State of Texas, the recording acts of which State have no force or effect upon cattle in the Indian Territory, and cannot have any force or effect on cattle which were at that time in Texas, and afterwards transferred to the Indian Territory, where they were afterwards levied upon.

Secondly, because said mortgage was never filed or recorded in accordance with the laws in force in the Indian Territory.

Mr. POLLARD: I also desire, in this connection, to offer the notes mentioned in said mortgage. The first note is dated San Antonio, Texas, January 22, 1896, made by John R. Blocker to Evans-Snyder-Buel Company for $14,012.41.

Next note is made at San Antonio, Texas, February 6, 1896,
11 and is for $3,642.15, signed by John R. Blocker, and is due August 5, 1896.

They are the very identical notes that are mentioned and described in the mortgage offered in evidence; not the copies, but the originals

Mr. HUTCHINGS: The only objection is that they are secured by that mortgage.

The COURT: The objection to the introduction of the mortgage offered in evidence, and the notes mentioned therein, is overruled.

Mr. HUTCHINGS: To which ruling of the court in so overruling plaintiff's objection, the plaintiff then and there duly excepted and still excepts.

Which chattel mortgage above offered in evidence is in words and figures as follows, to wit:

Evans-Snyder-Buel Co., St. Louis, Chicago, Kansas City, live-stock commission agent-.

Address us at National stock yards, St. Clair Co., Ill.; Union stock yards, Chicago, Ill.; Kansas City stock yards, Kansas City, Mo.

Chattel Mortgage.

Texas.

STATE OF TEXAS, }
County of Bexar. }

Know all men by these presents: That I, John R. Blocker, of the county of Bexar and State of Texas, for and in consideration of the sum of one hundred and twenty-two thousand one hundred and eighty-four & $\frac{82}{100}$ dollars, to me paid by H. M. Pollard, of the city of St. Louis, State of Missouri, receipt of which is hereby acknowledged, and for the purposes hereinafter expressed, have bargained and sold and by these presents do bargain and sell to the said H. M. Pollard of the city of St. Louis, State of Missouri, trustee, and his successors in this trust, the following-described property, to wit:

(6,250) sixty-two hundred and fifty head of cattle, 4,615 of them are three and four year old steers, and 1,635 of them are
12 cows, and branded as follows, to wit: 820 head of steers 78 left side, 1,653 head of steers left side, 922 head of steers O K on right side, 515 head of steers hip and side, 187 head of steers 77 left side, 320 head of steers left side, 198 head of steers

 left side, 205 head of cows H5 left side, 260 head of cows left side, 1,170 head of cows on left side.

Said above enumeration and description being intended to cover and include not only all the cattle owned by said mortgagor, as aforesaid, but all additions and accretions thereto are specifically included in and covered hereby. The cattle above described may have other brands or marks on them than those mentioned above, but those given are the holding brands or marks and carry the title to the cattle.

Now located in what are known as the McCaleb Pasture Co. pasture, and M. L. Minter's pasture, both from 2 to 15 miles south and west of the town of Muskogee and both in the Creek nation, Indian Territory.

Said cattle are all the cattle owned by said mortgagor in said pastures and they are all the cattle that are in said pastures having on them the brands herein mentioned and described.

And the said mortgagor will, and his heirs, executors and administrators shall, the right and title of said property to the H. M. Pollard of the city of St. Louis, State of Missouri, trustee, and his successors in this trust, forever warrant and defend.

It is provided, however, that the above-mentioned cattle shall be and remain in the possession of said mortgagor herein, and fed by the mortgagor during the term of this mortgage, subject to the conditions and stipulations hereinafter set forth and expressed; but the mortgagor shall have no right to move said cattle or any part thereof, from the place where they are now located except as may be herein provided, or to otherwise dispose of, or incumber said property without the written permission of the holder of the note or notes hereinafter mentioned, and at least three days before the maturity of said note or notes the above-described cattle shall be shipped and consigned to Evans-Snyder-Buel Co., at National stock yards, St. Clair Co., Ill.; Union stock yards, Chicago, Ill., or Kansas City stock yards, Kansas City, Mo., and sold by it on commission in the usual and customary way, and out of the proceeds it shall pay itsself the hereinafter-mentioned indebtedness, and a commission of fifty (50) cents per head on the whole number of cattle mentioned herein.

This instrument is intended as a trust for the better securing of Evans-Snyder-Buel Co. in payment of a sum equal to fifty
13 (50) cents for each and every head of said above-described cattle, and the further sum of $122,184.62 evidenced by my promis-ory notes described in substance as follows:

Description of Notes.

Date.	Maturity.	In favor of –	Where payable.	Rate of interest.	Am't.
1896.	1896.				
1-22-'96	7-21-'96	Evans-Snyder Buel Co.	Union stock yards, Ill.	10 p. c.	$14,012 41
2- 6-'96	8- 5-'96	" "	"	"	3,642 15
2-25-'96	8-24-'96	" "	"	"	14,758 06
3- 9-'96	9- 3-'96	" "	"	"	10,520 00
"	9-10-'96	" "	"	"	10,541 00
		National stock yards, Ill.			
"	9-17-'96	" "	"	"	10,563 00
"	9-24-'96	" "	"	"	10,585 00
"	10- 8-'96	" "	"	"	10,560 00
"	10-15-'96	" "	"	"	10,582 00
"	10-20-'96	" "	"	"	10,597 00
3-25-'96	8-25-'96	" "	"	"	5,223 00
"	9-30-'96	" "	"	"	5,278 00
"	10-28-'96	" "	"	"	5,323 00

All above notes are signed John R. Blocker, and one dated 2-25-'96 maturing 8-24-'96, for $14,758.06 is signed by Cornelia R. Blocker.

Together with any renewals or extensions of said note or notes or either of them, and the interest thereon, and such future advances as may be made by the said Evans-Snyder-Buel Co. to your said mortgagor.

Upon the payment of said promissory note or notes with interest thereon accrued and a sum equal to fifty (50) cents on each head of cattle together with the expenses incurred in executing the provisions of this mortgage being well and truly made, then this instrument is to be void; but in case of default in payment of said promissory note or notes, or either of them, at the maturity thereof, or the interest thereon, or the sum of fifty (50) cents per head commission, as aforesaid, upon each and every head of said cattle, the said trustee is then, or at any time thereafter, authorized and empowered, at the instance of the said Evans-Snyder-Buel Co. or the legal holder of said note or notes, to seize and to take into his possession all or any number or part of said cattle hereinabove described, and sell the same at public or private sale, as to said trustee may seem for the best interests of the parties hereto; said sale to
14 be for cash at such place as said trustee shall select. But if at public sale it shall be only after giving ten days' notice of the time and place of said sale, by posting two written notices thereof, one at the court-house door of the county in which said property is located, the other at place of sale; and for and in the name of the mortgagor to make and deliver to the purchaser or purchasers, all necessary bills of sale for the same, and to receive and receipt for the purchase-money thereof and apply the same to the payment of said promissory note or notes, and the interest thereon accrued, and fifty (50) cents per head commission, as aforesaid, on all of said cattle, and the

necessary expenses of said sale, and hold the remainder, if any, subject to the order of said mortgagor. It is further provides that, if the said mortgagor should attempt to move said property, or any part thereof, out of the way from the county or place in which the same is now located, or to sell, or to dispose of the same, in any manner inconsistent with the rights of the legal holder of said note or notes, without the written permission of said Evans-Snyder-Buel Co., or the legal holder of said notes or notes, then the said trustee shall be fully authorized and empowered to seize and sell said property as hereinabove provided, whether the said note or notes be due or not, and apply the proceeds as above specified; and it is further provides that in case said property, or any part thereof, should, at any time be seized, or about to be seized, by a third person under any process or claim whatever, then the said trustee shall be fully authorized and empowered to seize the said property, as aforesaid, and proceed to sell the same as aforesaid, and apply the proceeds in a manner as hereinabove specified, and if necessary, in order to get possession of said property from any person who may seize the same, the said trustee is fully authorized to institute any suit, or suits, either in his own name or the name of Evans-Snyder-Buel Co., or the holder of said note or notes, and employ all necessary counsel and pay all legal and other necessary expenses out of the proceeds of said property when sold.

Should any of the conditions of this instrument be broken, or violated, then at the option of said trustee, or Evans-Snyder-Buel Co., or the holder of said note or notes, the above-described indebtedness may become due and payable, instanter; or upon failure to pay said note or notes, or either of them at maturity, and the commission as herein provided, then in either event the whole of the above-described indebtedness shall become due and *ap*yable.

And in the event default is made in the payment of the note or notes hereinbefore mentioned, or either of them, at the maturity of same, or in the payment of any of the other obligations secured by this mortgage, whenever the same may become due, and the said note or notes, or either of them, or this mortgage is placed in the hands of an attorney for collection, or suit is brought thereon, upon a breach of any of the stipulations of the said note or notes, or mortgage, then and in either of these events, ten per cent. shall be added to the amount so, owing or due as attorneys' fees.

Provided, also, that in the option of the holders of the said note or notes or beneficiary under this mortgage said indebtedness secured by this mortgage*d* shall be payable at Fort Worth in Tarrant county, Texas; and in the event suit shall be brought on the said note or notes, or upon this mortgage, the same may, at the option of the beneficiary under this mortgage, or the holders of such indebtedness, be brought and maintained in any court having jurisdiction of the amount in controversy, in Tarrant county, State of Texas.

And in case *of* the said H. M. Pollard of the city of St. Louis, State of Missouri, trustee, shall, from any cause, be unable, or fail or refuse to act, or perform, any of the duties of the trust as herein provided, then the said Evans-Snyder-Buel Co., or the legal holder of said

note or notes are hereby fully authorized and empowered to appoint any other person to act as such trustee, either by written appointment endorsed upon this instrument, or by a separate instrument, and such person, when so appointed, shall have all the powers and authority herein given to the said H. M. Pollard, of the city of St. Louis, State of Missouri, and all the acts of the said trustee, and of any and all legally constituted substitutes by him or them lawfully appointed, are hereby ratified and confirmed by the mortgagor.

In witness whereof I have hereunto set my hand this 23rd day of April, A. D. 1896.

J. R. BLOCKER. [SEAL.]

Acknowledgement.

STATE OF TEXAS, }
County of Bexar, } ss:

Be it remembered, that on this 23rd day of April, 1896, before me, B. F. Darlington, a notary public, duly commissioned, within and for said county and State personally appeared John R. Blocker, personally well known to me to be the person described as mortgagor in, and whose name is subscribed to the foregoing mortgage, and stated and acknowledged to me that he executed the same for the purposes and consideration therein expressed, mentioned and set forth, as his free act and deed.

In witness whereof I have hereunto set my hand and notarial seal this day and year last above written.

16 [SEAL.] B. F. DARLINGTON,
Notary Public, Bexar County, Texas.

My commission expires June 30th, 1897.

Sworn Statement.

STATE OF TEXAS, }
County of Bexar, } ss:

John R. Blocker, the mortgagor above mentioned, being sworn, says that said mortgagor is the legal and absolute owner of the cattle above described, and that the same are now in possession and under his control and are now located in the McCaleb Pasture Co.'s pasture and the M. L. Minter pasture both of which are 2 to 15 miles south and west of the town of Muskogee and in the Creek nation Indian Territory, and that the same are free from all claims or liens whatsoever, except what mortgages are held by H. M. Pollard, trustee, for Evans-Snyder-Buel Co. And that the said mortgagor is a resident of Bexar county, State of Texas.

JOHN R. BLOCKER.

Subscribed and sworn to before me this 23rd day of April, 1896.

[SEAL.] B. F. DARLINGTON,
Notary Public, Bexar Co., Texas.

My commission expires June 30th, 1897.

Certificate of Original Chattel Mortgage that Copy is Filed.

STATE OF TEXAS, } ss:
County of Bexar, }

I, Thad W. Smith, clerk of the county court, in and for said county, do hereby certify that the foregoing original chattel mortgage, from John R. Blocker to H. M. Pollard, trustee, together with a copy thereof, was this day presented to me for comparison with said original, in accordance with law, and that I have carefully compared said copy with said original, and find the same to be a true and correct copy thereof, and in accordance with said law said copy was this day deposited, and was by me duly entered in the Register of Chattel Mortgages, volume 5, page 30.

In testimony whereof witness my hand and official seal at San Antonio, this 24th day of April, 1896.

[SEAL.] THAD W. SMITH,
Clerk County Court,
By JOHN STAPPENBECK, *Deputy.*

Attached to the above chattel mortgage is the following:

17 *Certificate of Record.*

UNITED STATES OF AMERICA, } ss:
Indian Territory, Northern District, }

I, James A. Winston, clerk of the United States court in the northern district, Indian Territory, do hereby certify that the instrument hereto attached was filed for record in my office the 27th day of April, 1896, at 8 a. m., and duly recorded in Book E, pages 503 & '4.

Witness my hand and seal of said court at Muskogee, in said Territory, this the 28th day of April, A. D. 1896.

[SEAL.] JAMES A. WINSTON, *Clerk,*
By —— ——, *Deputy.*

(The above chattel mortgage is marked Exhibit "A.")

Mr. POLLARD: I now desire to offer in evidence chattel mortgage given by John R. Blocker to H. M. Pollard, trustee, for Evans-Snyder-Buel Co., dated May 19, 1896, and acknowledged by Blocker in Bexar county, and recorded in the office of the clerk of the United States court at Muskogee on the 23d day of May, 1896, covering 525 head of cattle, and made to secure three notes aggregating $9,844.60, and we offer in conjunction with that mortgage the original notes mentioned therein.

Mr. HUTCHINGS: Plaintiffs object to the introduction of this mortgage because it shows upon its face that the mortgagor was a resident of the State of Texas, and that the cattle were situated in the Creek nation, Indian Territory, and that the mortgagor was not only in possession of the cattle at the time, but that he was to contin-e to hold posses-

sion thereof until the happening of certain contingencies named in the mortgage, and that being a non-resident of the Indian Territory said mortgage could not be and was not recorded in accordance with the laws in force in said Territory.

The court overruled said objection to which plaintiff excepted.

Which said chattel mortgage above offered in evidence by the interpleader is in words and figures as follows, to wit:

18 Evans-Snyder Buel Co., St. Louis, Chicago, Kansas City, live-stock commission agent-.

Ad-ress us at National stock yards, St. Clair Co., Ill.; Union stock yards, Chicago, Ill.; Kansas City stock yards, Kas. City, Mo.

Chattel Mortgage.

Texas.

STATE OF TEXAS, }
County of Bexar, } *ss:*

Know all men by these presents: That I, John R. Blocker of the county of Bexar, and the State of Texas, for and in consideration of the sum of ninety-eight hundred fourty-four and $\frac{60}{100}$ dollars to me paid by H. M. Pollard, of the city of St. Louis, State of Missouri, receipt of which is hereby acknowledged, and for the purpose hereinafter expressed has bargained and sold and by these presents do bargain and sell to the said H. M. Pollard of the city of St. Louis, State of Missouri, trustee, and his successors in this trust the following-described property, to wit:

(525) five hundred and twenty-five head of three and four year old steers, all branded NP or *N* on left side.

Said above enumeration and description being intended to cover and include, not only all the cattle owned by said mortgagor as aforesaid, but all additions and accretions thereto are specifically included in and covered thereby. The cattle above described may have other brands or marks on them than those mentioned above, but those given are the holding brands or marks and carry the title to the cattle.

Now located in what is known as the McCaleb Pasture Co.'s pasture located south and west of the town of Muskogee, and in the Creek nation, Indian Territory.

Said cattle are all the cattle owned by said mortgagor in said —— and they are all the cattle that are in said —— having on them the brands herein mentioned and described.

And the said mortgagor will, and his heirs, executors and administrators shall, the right and title of said property to the said H. M. Pollard of the city of St. Louis, State of Missouri, trustee, and his successors in this trust, forever warrant and defend.

19 It is provided, however, that the above-mentioned cattle shall be and remain in the possession of said mortgagor herein, and fed by the mortgagor during the term of this mortgage, subject to the

conditions and stipulations hereinafter set forth and expressed; but the mortgagor shall have no right to remove said cattle or any part thereof from the place where they are now located, excepting as may be herein provided, or to otherwise dispose of, or encumber said property without the written permission of the holder of the note, or notes hereinafter mentioned, and at least three days before the maturity of said note or notes, the above-described cattle shall be shipped to and consigned to Evans-Snyder-Buel Co., at National stock yards, St. Clair Co., Ill., Union stock yards, Chicago, Ill., or Kansas City stock yards, Kansas City, Mo., and sold by it on commission of fifty (50) cents per head on the whole number of cattle mentioned herein.

This instrument is intended as a trust for the better securing of Evans-Snyder-Buel Co. in the payment of a sum equal to fifty (50) cents for each and every head of said above-described cattle; and the further sum of $9,844.15 evidenced by my promissory notes described in substance as follows:

Description of Notes.

Date.	Maturity.	In favor of—	Where payable.	Rate of int.	Am't.
1896.	1896.				
5- 6-'96	8-15-'96	Evans-Snyder Buel Co.	National stock yards, Ill.	10 p. c.	$3,087.47
5- 6-'96	9-15-'96	"	"	"	3,315.08
5-19-'96	10- 5-'96	"	"	"	3,641.60

Above notes signed by J. R. Blocker.

Together with any renewals or extensions of said note or notes, or either of the-, and the interest thereon, and such future advances as may be made by the said Evans-Snyder-Buel Co. to the said mortgagor.

Upon the payment of said promissory note or notes with interest thereon accrued and a sum equal to fifty (50) cents on each head of said cattle, together with the expenses incurred in executing the provisions of this mortgage being well and truly made, then this instrument is to become void, but in case of default in payment of said promissory note or notes or either of them, at the maturity thereof, or the interest thereon, or the sum of fifty (50) cents per head commission, as aforesaid, upon each and every head of cattle, the head trustee is then or at any time thereafter authorized and empowered at the instance of the said Evans-Snyder-Buel Co. or the legal holder of said note or notes, to seize and take into his possession, all or any number or part of said cattle hereinabove described, and sell
20 the same at public or private sale, as to said trustee may seem for the best interests of all parties hereto; said sale to be for cash at such place as said trustee shall elect. But if at public sale it shall only be after giving ten days' notice of the time and place of said sale by posting two written notices thereof, one at the court-house door of the county in which said property is located, the other at the place of sale; and for and in the name of the mortgagor to make and de-

liver to the purchaser, or purchasers, all necessary bills of sale, and to receive and receipt for the purchase-money thereof and apply the same to the payment of said promissory note or notes and the interest thereon accrued, and fifty (50) cents per head commission as aforesaid, on all of said cattle, and the necessary expenses of said sale, and hold the remainder if any, subject to the order of the mortgagor. It is further provided that, if the said mortgagor should attempt to move said property, or any part thereof, out of the way of the county or place in which the same is now located, or sell or dispose of the same, in any manner inconsistent with the rights of the legal holder of said note or notes without the written permission of the Evans-Snyder-Buel Co., or the legal holder of said not- or notes, then the said trustee shall be fully authorized and empowered to seize and sell said property as hereinabove provided, whether the said note or notes be due or not, and apply the proceeds as above specified, and it is further provided that in case said property, or any part thereof, should, at any time be seized, by any third person, under any process, or claim whatever, then the said trustee shall be fully authorized and empowered to seize the said property, as aforesaid and proceed and sell the same as aforesaid, and apply the proceeds in the manner hereinabove specified, and, if necessary, in order to get possession of said property from any person who may seize the same, the said trustee is fully authorized to institute any suit or suits, either in his own name or in the name of Evans-Snyder-Buel Co. or the holder of said note or notes, and employ all necessary counsel and pay all legal and other necessary expenses out of the proceeds of said property, when sold.

Should any of the conditions of this intrument be broken or violated, then at the option of said trustee, or Evans-Snyder-Buel Co., or the holder of said note or notes, the above-described indebtedness may become due and payable, instanter, or upon failure to pay said note or notes, or either of them at maturity and the commission herein provided for, then, in either event the whole of the above-described indebtedness shall become due and payable.

And in the event default is made in the payment of the note or notes hereinbefore mentioned, or either of them at the maturity of the same or in the payment of any of the other obligations secured by this mortgage, whenever the same shall become due and
21 the said note or notes or either of them or this mortgage is placed *is placed* in the hands of an attorney for collection, or suit is brought thereon, upon the breach of any of the stipulations of the said note or notes or mortgage, then, and in either of these events, ten per cent. shall be added to the amount so owing or due as attorneys' fees.

Provided also, that at the options of the holders of the said note or notes as beneficiary under this mortgage, said indebtedness secured by this mortgage shall be payable at Fort Worth, in Tarrant county, Texas; and in the event suit shall be brought on said note or notes or upon this mortgage, the same may at the option, of the beneficiary under this mortgage or the holder of such indebtedness,

be brought and maintained in any court having jurisdiction of the amount in controversy, in Tarrant county, State of Texas.

And in the case the said H. M. Pollard, of the city of St. Louis, State of Missouri, trustee, shall, from any cause, be unable, or fail or refuse to act, or perform, any of the duties of the trust as herein provided, then the said Evans-Snyder-Buel Co., or the legal holder of said note or notes are hereby fully authorized and empowered to appoint any other person to act as such trustee, either by written appointment endorsed upon this instrument, or by a separate instrument, and such person when so appointed, shall have all the powers and authority herein given to the said H. M. Pollard, of the city of St. Louis, State of Missouri; and all the acts of the said trustee, and of any and all legally constituted substitutes by him or them lawfully appointed, are hereby ratified and confirmed by the mortgagor.

In witness whereof I have hereunto set my hand this 19th day of May, A. D. 1896.

J. R. BLOCKER. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]

Acknowledgement.

STATE OF TEXAS, }
County of Bexar, } ss:

Be it remembered that on this 19th day of May, 1896, before me B. F. Darlington, a notary public, duly commissioned within and for said county and State personally appeared John R. Blocker personally well known to me to be the person described as the mortgagor in, and whose name is subscribed to the foregoing mortgage, and stated and acknowledged to me that he executed the same for the purposes and consideration therein expressed, mentioned and set forth as his free act and deed.

22 In witness whereof I have hereunto set my hand and notarial seal this day and year last above written.

[SEAL.] B. F. DARLINGTON,
Notary Public, Bexar Co., Texas.

My commission expires June 30, 1897.

Sworn Statement.

STATE OF TEXAS, }
County of Bexar, } ss:

J. R. Blocker, the mortgagor above mentioned, being sworn says that said mortgagor is the legal and absolute owner of the cattle above described, and that the same are now in possession and under his control and are now located in what is known as the McCaleb Pasture Co.'s pasture in the Creek nation, Indian Territory, and that the same are free from all claims and liens whatsoever.

And that said mortgagor is a resident of Bexar county, State of Texas.

J. R. BLOCKER.

Subscribed and sworn to before me this the 19th day of May, 1896.

B. F. DARLINGTON,
Notary Public, Bexar Co., Texas.

My commission expires June 30th, 1897.

Attached to the above chattel mortgage is written and printed the following:

Certificate of Record.

UNITED STATES OF AMERICA, } ss:
Indian Territory, Northern District, }

I, Jas. A. Winston, clerk of the United States court in the northern district, Indian Territory, do hereby certify that the instrument hereto attached was filed for record in my office the 23d day of May, 1896, at 1 p. m., and duly recorded in Book E, page- 513 & '14.

Witness my hand and seal of said court at Muscogee in the said Territory, this 25th day of May, A. D. 1896.

JAS. A. WINSTON, *Clerk*,
By —— ——, *Deputy*.

(The above chattel mortgage is marked "Exhibit B.")

Mr. POLLARD: I now offer in evidence chattel mortgage from J. R. Blocker, to H. M. Pollard, trustee, for Evans-Snyder-Buel
23 Company, dated the 22nd day of January, 1896, covering 874 head of beef steers, being a portion of the cattle levied on in this case, the mortgage at the time describes the cattle as being in a pasture known as the Hirsh pasture, about eighteen miles east of the town of Encinal and in Encinal county, Texas, with the acknowledgement at the time, and showing that Mr. Blocker was at that time a resident of the State of Texas, and the county of Bexar, which mortgage was recorded in the county of Bexar, in the State of Texas on the 22nd day of January, 1896, and also in the county of Webb, in the State of Texas; together with the original notes mentioned therein, aggregating $14,012.41.

Mr. HUTCHINGS: Plaintiffs make the same objection to the introduction of this mortgage which was made to the introduction of the mortgage marked Exhibit A.

Which objection was by the court overruled, to which ruling of the court the plaintiffs duly excepted.

Which said mortgage introduced in evidence by the interpleader, is in words and figures as follow, to wit:

Original.

Evans-Snyder-Buel Co., St. Louis, Chicago, Kansas City, live-stock commission agent-.

Address us at National stock yards, St. Clair Co., Ill.; Union stock yards, Chicago, Ill.; Kansas City stock yards, Kas. City, Mo.

Chattel Mortgage.

Texas.

STATE OF TEXAS, }
County of Bexar, } *ss:*

Know all men by these presents that I, John R. Blocker, of the county of Bexar, and State of Texas, for and in the consideration of the sum of fourteen thousand twelve and $\frac{41}{100}$ dollars to me paid by H. M. Pollard of the city of St. Louis, State of Missouri, receipt of which is hereby acknowledged, and for the purposes hereinafter expressed, have bargained and sold and by these presents do bargain and sell to the said H. M. Pollard of the city of St. Louis, State of Missouri, trustee and his successors in this trust the following-described property, to wit:

(874) eight hundred and seventy-four head of beef steers,
24 three and four years old. Said steers are all branded 7S on left side.

Said above enumeration and description being intended to cover and include not only all the cattle owned by said mortgagor as aforesaid, but all additions and accretions thereto are specially included and covered hereby. The cattle above described may have other brands and marks on them than those mentioned above, but those given are the holding brands or marks, and carry the title to the cattle.

Now located in what is known as the Hirsh pasture, about eighteen miles east of the town of Encinal, and in Encinal county, Texas.

Said cattle are all the cattle owned by said mortgagor, in said county and adjoining counties and they are all the cattle there are in said counties having on them the brands herein mentioned and described.

And the said mortgagor will, and his heirs, executors and administrators shall, the right and title of said property to the said H. M. Pollard of the city of St. Louis, State of Missouri, trustee, and his successors in this trust forever warrant and defend. It is provided, however, that the said above-mentioned cattle shall be and remain in the possession of said mortgagor herein, and fed by the mortgagor during the term of this mortgage, subject to the conditions and stipulations hereinafter set forth and expressed; but the mortgagor shall have no right to remove said cattle or any part thereof, from the place where they are now located, excepting as may herein be provided, or to otherwise dispose of, or encumber said property without the written permission of the holder of the note or notes hereinafter mentioned, and at least three days before the maturity

of said note or notes the above-described cattle shall be shipped to and consigned to Evans-Snyder-Buel Co., at National stock yards, St. Clair Co., Ill., Union stock yards, Chicago, Ill., or Kansas City stock yards, Kansas City, Mo., and sold by it on a commission in the usual and customary way and out of the proceeds it shall pay itsself the hereinafter-mentioned indebtedness, and a commission of fifty (50) cents per head on the whole number of cattle mentioned herein.

This instrument is intended as a trust for the better securing of Evans-Snyder Buel Co. in the payment of the sums equal to fifty (50) cents for each and every head of said above-described cattle, and the further sum of $14,012.41, evidenced by my promissory note, described in substance as follows:

25 *Description of Note.*

No.	Date.	Time of maturity.	In favor of—	Where payable.	Rate int.	Am't.
	Jan. 22, 1896	July 21, '96	Evans-Snyder Buel Co.	Union St. Yds., Chicago, Ill.	10 p.c	$14,012.41

Above-described note is signed by John R. Blocker.

The principal of the above note was advanced by said Evans-Snyder-Buel Co. at the special instance and request of said J. R. Blocker to take up his note due First National Bank of Eagle Pass, and secured by a lien on said before-described cattle, and it is understood said lien is carried forward herein.

Together with any renewals or extensions of said note or notes or either of the-, and the interest thereon.

Upon the payment of said promissory note or notes with interest thereon accrued, and a sum equal to fifty (50) cents on each head of said cattle, together with the expenses incurred in executing the provisions of this mortgage, being well and truly made, then this instrument is to become void, but in case of default of payment of said promissory note or notes, or either of the- at the maturity thereof, or the interest thereon or the sum of fifty cents (50) cents per head commission, as aforesaid, upon each and every head of said cattle, the said trustee is then, or at any time thereafter, authorized and empowered at the instance of the said Evans-Snyder-Buel Co., or the legal holder of the said note or notes to seize and to take into his possession all or any number or part of said cattle hereinabove described and sell the- at public or private sale as to the said trustee may seem for the best interests for the parties hereto, said sale to be for cash at such place as such trustee shall elect.

But if at public sale it shall be only after giving ten days' notice of the time and place of said place of sale by posting two written notices thereof, one at the court-house door of the county in which the said property is located, the other at the place of sale; and for and in the name of the mortgagor to make and deliver to the pur-

chaser, or purchasers all necessary bills of sale for the same, and to receive and receipt for the purchase-money thereof, and apply the same to the payment of said promissory note or notes and the interest thereon accrued, and fifty — (50c.) per head, commission, as aforesaid, on all of said cattle, and the necessary expenses of said sale, and hold the remainder, if any subject to the order of said mortgagor. It is further provided that, if the said mortgagor should attempt to move said property or any part thereof out of the way from
26 the county or place in which the same is now located, or to sell or dispose of the same, in any manner inconsistent with the rights of the legal holder of the note or notes, without the written permission of Evans-Snyder Buel Co. or the legal holder of said note or notes, then the said trustee, shall be fully authorized and empowered to seize and sell said property as hereinabove provided, whether the said notes be due or not, and apply the proceeds as above specified; and it is further provided that in case said property, or any part thereof, should at any time be seized, or about to be seized, by any third person, under any process or claim, whatever, then the said trustee shall be fully authorized and empowered to seize the said property as aforesaid, and proceed and sell the same as aforesaid, and apply the proceeds in a manner as hereinabove specified, and, if necessary, in order to get possession of said property from any person who may seize the same the said trustee is fully authorized to institute any suit or suits either in his own name or in the name of Evans-Snyder-Buel Co., or the holder of said note or notes, and employ all necessary counsel and pay all legal and other necessary expenses out of the proceeds of said property, when sold.

Should any of the conditions of this instrument be broken or violated, then, at the option of said trustee, or Evans-Snyder-Buel Co., or the holder of said note or notes, the above-described indebtedness may become due and payable instanter; or upon failure to pay said note or notes, or either of them at maturity, and the commission as herein provided, then, in either event, the whole of the above-described indebtedness shall become due and payable.

And in case of the said H. M. Pollard of the city of St. Louis, State of Missouri, trustee, shall, from any cause, be unable or fail, or refuse to act, or to perform, any of the duties of the trust as herein provided then the said Evans-Snyder-Buel Co., or the legal holder of said note or notes are hereby fully authorized and empowered to appoint any other person to act as such trustee, either by written appointment endorsed upon this instrument or by a separate instrument, and such person, when so appointed, shall have all the powers and authority herein given to the said H. M. Pollard of the city of St. Louis, State of Missouri, and all the acts of the said trustee and of any and all legally constituted substitutes by him or them lawfully appointed, are hereby ratified and confirmed by the mortgagor.

In witness whereof I have hereunto set my hand, this 22nd day of January, A. D. 1896.

JOHN R. BLOCKER. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

27 *Acknowledgement.*

STATE OF TEXAS, } ss:
County of Bexar, }

Be it remembered, that on this 22nd day of January, 1896, before me, John A. Fraser, a notary public, duly commissioned, within and for the said county and State personally appeared John R. Blocker personally well known to me to be the person described as mortgagor in, and whose name is subscribed to the foregoing mortgage, and stated and acknowledged to me that he executed the same for the purposes and considerations therein expressed, mentioned and set forth, as his free act and deed.

In witness whereof, I have hereunto set my hand and notarial seal this day and year last above written.

[SEAL.] JOHN A. FRASER,
Notary Public, Bexar Co., Texas.

My commission expires June 1st, 1897.

Sworn Statement.

STATE OF TEXAS, } ss:
County of Bexar, }

John R. Blocker, the mortgagor above mentioned, being sworn, says that said mortgagor is the legal and absolute owner of the cattle above described, and that the same are free from all claims or liens whatsoever, and the said mortgagor is a resident of Bexar county, State of Texas.

JOHN R. BLOCKER.

Subscribed and sworn to before me this 22nd day of January, 1896.

[SEAL.] JOHN A. FRASER,
Notary Public, Bexar Co., Texas.

My commission expires June 1st, 1897.

STATE OF TEXAS, } ss:
County of Bexar, }

I, Thad W. Smith, county clerk of Bexar county, do hereby certify that a true copy of the above and foregoing chattel mortgage has this day been filed for registration in my office under the chattel-mortgage law, and as the same appears registered in Book, vol. 4, Register of Chattel Mortgages, of Bexar county, Texas.

Witness my hand and official seal at office in the *the* city of San Antonio, Texas, this 22nd day of January, 1896.

[SEAL.] THAD W. SMITH,
C. Ct'k, Bex. Co., Texas,
By JOHN STAPPENBECK, *Deputy.*

Certificate to Original Chattel Mortgage that Copy is Filed.

STATE OF TEXAS, }
County of Webb, } ss:

I, Geo. R. Page, clerk of the county court, in and for said county, do hereby certify that the foregoing original chattel mortgage, from John R. Block to H. M. Pollard, trustee, together with a copy thereof, was this day presented to me for comparison with said original, in accordance with law, and that I have carefully compared said copy with said original, and find the same to be a true and correct copy thereof; and in accordance with said law said copy was this day deposited, and was by me duly entered in the Register of Chattel Mortgages, Encinal county, volume 1, page 28.

In testimony whereof, witness my hand and official seal, at Lando, Texas, this 24th day of January, 1896.

[SEAL.]

GEO. R. PAGE,
Clerk County Court,
By —— ——, *Deputy.*

(The above chattel mortgage is marked "Exhibit C.")

Mr. POLLARD: I will now offer in evidence mortgage from John R. Blocker to H. M. Pollard, trustee, for Evans-Snyder-Buel Co., dated February 6, 1896, covering 237 head of cattle, being a portion of those levied on in this case. The said mortgage was acknowledged and recorded in Bexar county, in the State of Texas, on the 6th day of February, 1896, and also in the county of Maverick, State of Texas, on the 8th day of February, 1896, and in connection therewith I desire to offer the notes mentioned in said mortgage, to secure which the same was given, and aggregating $3,642.15, the mortgage described the cattle as then being located in Maverick county, Texas.

Mr. HUTCHINGS: The plaintiffs offer the same — introduction of this mortgage which was offered to the introduction of Exhibit "A."

Objection overruled by the court, to which ruling the plaintiffs duly excepted.

Which chattel mortgage, above offered in evidence by the interpleader, is in words and figures as follows, to wit:

29 Original.

Evans-Snyder-Buel Co., St. Louis, Chicago, Kansas City, live-stock commission agent-.

Address us at National stock yards, St. Clair Co., Ill.; Union stock yards, Chicago, Ill.; Kas. City stock yards, Kas. City, Mo.

Chattel Mortgage.

Texas.

STATE OF TEXAS, }
County of Bexar, } *ss:*

Know all men by these presents: That I, John R. Blocker, of the county of Bexar, State of Texas, for and in the consideration of the sum of thirty-six hundred forty-two and $\frac{15}{100}$ dollars, to me paid by H. M. Pollard, of the city of St. Louis, State of Missouri, receipt of which is hereby acknowledged, and for the purposes hereinafter expressed have bargained and sold, and by these presents do bargain and sell to the said H. M. Pollard of the city of St. Louis, State of Missouri, trustee, and his successors in this trust the following-described property, to wit:

(237) four-year-old steers, branded 78 on left side, in various marks and other brands but the above is the holding brand, being the same cattle purchased by Evans-Snyder-Buel Co. from J. D. Sharp in Maverick county, on the 27th day of January, 1896, as shown by the bill of sale executed by said Sharp to said Evans-Snyder-Buel Co. and being said cattle rather steers conveyed to and by said Evans-Snyder-Buel Co. sold to John R. Blocker the considerations and payment of which is evidenced by the promissory note of said Blocker described herein.

Said above enumeration and description being intended to cover and include, not only all the cattle owned by said mortgagor, as aforesaid, but all additions and accretions thereto are specifically included in and covered thereby. The cattle above described may have other brands or marks on them than those mentioned above, but those given are the holding brands or marks and carry the title to the cattle.

Now located in W. P. Thompson pasture, Maverick county, Texas.

Said cattle are all the cattle owned by said mortgagor, in said county, and they are all the cattle there are in said county having on them the brands herein mentioned and described.

30 And the said mortgagor will, and his heirs, executors and administrators shall, the right and title of said property to the said H. M. Pollard, of the city of St. Louis, State of Missouri, trustee, and his successors in this trust, forever warrant and defend.

It is provided, however, that the said above-mentioned cattle shall be and remain in the possession of said mortgagor herein, and fed by the mortgagor during the term of this mortgage, subject to the conditions and stipulations hereinafter set forth and expressed, but the mortgagor shall have no right to remove said cattle, or any part

thereof, from the place where they are now located, excepting as may herein be provided, or to otherwise dispose of, or to encumber said property without the written permission of the holder of the note or notes hereinafter mentioned, and at least three days before the maturity of said note or notes the above-described cattle shall be shipped and consigned to Evans-Snyder-Buel Co., at National stock yards, St. Clair Co., Ill.; Union stock yards, Chicago, Ill., or Kansas City stock yards, Kansas City, Mo., and sold by it on commission in the usual and customary way, and out of the proceeds it shall pay itsself the hereinafter-mentioned indebtedness, and a commission of fifty cents (50c.) per head on the whole number of cattle mentioned herein.

This instrument is intended as a trust for the better securing of Evans-Snyder-Buel Co. in the payment of a sum equal to fifty — (50c.) for each and every head of said above-described cattle, and the further sum of $3,642.15 evidenced by my promis-ory notes described in substance as follows:

Description of Note.

No.	Date.	Time of maturity.	In favor of—	Where payable.	Rate of int.	Am't.
	Feb. 6th.	Aug. 5th.	Evans-Snyder Buel Co.	Union stock yards, Chicago, Illinois.	7	$3,642 15

Above-described notes signed by John R. Blocker.

Together with any renewals or extensions of said note or notes or either of them and the interest thereon.

Upon payment of said promissory note or notes with interest thereon accrued, and a sum equal to fifty cents (50c.) on each head of said cattle together with the expenses incurred in executing the provisions of this mortgage being well and truly made then this instrument is to become void, but in case of default in payment of said promissory note or notes, or either of them at maturity thereof, or the interest thereon, or the sum of fifty cents (50c.) per
31 head commission, as aforesaid, upon each and every head of said cattle, the said trustee is then, or at any time thereafter, authorized and empowered at the instance of the said Evans-Snyder-Buel Co., or the legal holder of said note or notes, to seize and take into his possession all or any number or part of said cattle hereinabove described, and sell the same at public or private sale, as to the said trustee may seem for the best interests of the parties hereto; said sale to be for cash at such place as such trustee shall elect. But if at public sale it shall be only after giving ten days' notice of the time and place of said sale by posting two written notices thereof, one at the court-house door of the county in which said property is located, the other at the place of sale; and for and in the name of the mortgagor to make and deliver to the purchaser, or purchasers all necessary bills of sale for the same, and to receive and

receipt for the purchase-money thereof, and apply the same to the payment of said promissory note or notes and the interest thereon accrued and fifty cents (50c.) per head commission as aforesaid on all said cattle, and the necessary expenses of sale, and hold the remainder if any, subject to the order of the mortgagor. It is further provided that, if the said mortgagor should attempt to move said property, or any part thereof out of the way from the county or place in which the same is now located, or to sell or dispose of the same, in any manner inconsistent with the rights of the legal holder of said note or notes, without the written permission of said Evans-Snyder-Buel Co., or the legal holder of said note or notes, then the said trustee shall be fully authorized and empowered to seize and sell said property as hereinabove provided, whether the said note or notes be due or not, and apply the proceeds as above specified; and it is further provided that in case said property, or any part thereof, should at any time, be seized, or about to be seized, by any third person, under any process, or claim whatsoever, then the said trustee thall be fully authorized and empowered to seize the said property, as aforesaid, and proceed to sell the same as aforesaid, and apply the proceeds in a manner as hereinabove specified, and, if necessary, in order to get possession of said property, from any person who may seize the same, the said trustee is fully authorized to institute any suit, or suits, either in his own name or in the name of the Evans-Snyder-Buel Co., or the legal holder of said note or notes, and employ all necessary counsel and pay all legal and other necessary expenses out of the proceeds of said property, when sold.

Should any of the conditions of this instrument be broken or violated, then, at the option of the said trustee, or Evans-Snyder-Buel Co., or the holder of said note or notes, the above-described indebtedness may become due and payable instanter: or upon failure to pay said note or notes or either of them at maturity, and the commission herein provided, then in either event, the whole of the above indebtedness shall become due and payable.

32 And in case the said H. M. Pollard, of the city of St. Louis, State of Missouri, trustee, shall, from any cause, be unable, or fail, or refuse to act, or perform any of the duties of the trust as herein provided, then the said Evans-Snyder-Buel Co., or the legal holder of said note or notes are hereby fully authorized and empowered to appoint any other person to act as such trustee, either by written appointment endorsed upon this instrument, or by a separate instrument, and such person, when so appointed shall have all the powers and authority herein given to the said H. M. Pollard, of the city of St. Louis, State of Missouri, and all the acts of the said trustee, and of any and all legally constituted substitutes by him or them lawfully appointed, are hereby ratified and confirmed by the mortgagor.

In witness whereof, I have hereunto set my hand this 6th day of February, A. D. 1896.

J. R. BLOCKER. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]

Acknowledgement.

STATE OF TEXAS, }
County of Bexar, } ss:

Be it remembered, that on this 6th day of February, 1896, before me B. F. Darlington, a notary public duly commissioned within and for said county and State, personally appeared John R. Blocker, personally well known to me to be the person described as mortgagor in, and whose name is subscribed to the foregoing mortgage, and stated and acknowledged to me that he executed the same for the purposes and consideration therein expressed, mentioned, and set forth, as his free act and deed.

In witness whereof, I have hereunto set my hand and notarial seal this day and year last above written.

[SEAL.] B. F. DARLINGTON,
Notary Public, Bexar Co., Tex.

My commission expires June 1st, 1897.

Certificate to Original Chattel Mortgage that Copy is Filed.

STATE OF TEXAS, }
County of Bexar, } ss:

I, Thad W. Smith, clerk of the county court in and for said county, do hereby certify that the foregoing original chattel mortgage from J. R. Blocker to Evans-Snyder-Buel Co., together with a copy
33 thereof was this day presented to me for comparison with said original, in accordance with law, and that I have carefully compared said copy with said original and find the same to be a true and correct copy thereof and in accordance with said law said copy was this day deposited and was by me duly entered in the Register of Chattel Mortgages, volume No. 5, page 1.

In testimony whereof, witness my hand and official seal at San Antonio, this 6th day of February, 1896.

THAD W. SMITH,
[SEAL.] *Clerk County Court,*
By JOHN STAPPENBECK, *Deputy.*

Certificate to Original Chattel Mortgage that Copy is Filed.

STATE OF TEXAS, }
County of Maverick, } ss:

I, C. W. Hartup, clerk of the county court in and for said county, do hereby certify that the foregoing original chattel mortgage from J. R. Blocker to H. M. Pollard, trustee, together with a copy thereof, was this day presented to me for comparison with said original in accordance with law, and that I have carefully compared said copy with said original and find the same to be a true and correct copy thereof, and in accordance with said law said copy was this day de-

posited, and was by me duly entered in the Register of Chattel Mortgages, volume S, page 38.

In testimony whereof, witness my hand and official seal at Eagle Pass, Texas, this 8th day of Feb'y, 1896.

C. W. HARTUP,
[SEAL.] *Clerk County Court,*
By —— ——, *Deputy.*

(The above and foregoing chattel mortgage is marked Exhibit "D.")

The original notes mentioned in Exhibits A, B, C, D, which were introduced and considered read in evidence, are in words and figures as follows, to wit:

First Note Offered in Conjunction with Exhibit A.

Due July 21st, 1896. No. 13190.

No. —.

SAN ANTONIO, TEXAS, *Jan. 22nd*, 1896.

On July 21st, 1896, after date, I promise to pay to the order of Evans-Snyder-Buel Co. fourteen thousand twelve and $\frac{41}{100}$
34 dollars, for value received, payable at its office, at Union stock yards, Chicago, Ill., with interest at the rate of 7 per cent. per annum, from maturity and until paid.

—— ——.

$14,012.41. Secured by
Due ——, —. 874 steers.
P. O., San Antonio, Texas.

Said note is signed by John R. Blocker, and across face of same is marked in large red letter- "Paid."

Second Note Offered in Conjunction with Exhibit "A."

Due August 5th, 1896. No. 13335.

No. —.

SAN ANTONIO, TEXAS, *Feb. 6th*, 1896.

On August 5th, 1896, after date, I promise to pay to the order of Evans-Snyder-Buel Co. thirty-six hundred forty-two and $\frac{15}{100}$ dollars, for value received, payable at its office, at Union stock yards, Chicago, Ill., with interest at the rate of 7 per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$3,642.15. Secured by
Due Aug. 5th, '96. mortgage on 237 cattle.
P. O. San Antonio, Texas.

Said note signed by J. R. Blocker and across the face of the note written in large red letters is the word "Paid."

Next Note Offered in Evidence.

Due August 24th, 1896. No. 13413.

No. —.

SAN ANTONIO, TEXAS, *Feb. 25th*, 1896.

On August 24th, 1896, after date, we, or either of us, promise to pay to the order of Evans-Snyder-Buel Co. fourteen thousand seven hundred fifty-eight and $\frac{6}{100}$ dollars, for value received, payable at its office, at Union stock yards, Chicago, Ill., with interest at the rate of 7 per cent. per annum, from maturity until paid.

JOHN R. BLOCKER,
CORNELIA BLOCKER.

$14,758.06. Secured by
Due ——, —. mortgage on 3,000 cattle.
P. O. San Antonio, Texas.

Said note signed by John R. Blocker and Cornelia Blocker, and has written across its face in large red letters the word "Paid."

Next Note Offered in Evidence by Interpleader.

No. 277 (in pencil) C 1-2. 80612.

SAN ANTONIO, TEXAS, *M'ch 9th*, 1896.

September 3d, 1896, after date, without grace, I promise to pay to the order of Evans-Snyder-Buel Co. ten thousand five hun-
35 dred twenty dollars for value received, negotiable and payable at its office, at Union stock yards, Chicago, Ill., with interest at the rate of 7 per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$10,520.00 Secured by
Due Sep. 3, 1896. 9,000 cattle.
P. O. San Antonio, Texas. Mtge. Ind. Ter. & Tex.
Said note is signed by J. R. Blocker.

Next Note Offered by Interpleader.

C 1-2, No. 278.

SAN ANTONIO, TEXAS, *March 9th*, 1896.

September 10th, 1896, after date, without grace, I promise to pay to the order of Evans-Snyder-Buel Co. ten thousand five hundred and forty-one dollars, for value received, negotiable and payable at its office, at Union stock yards, Chicago, Ill., with interest at the rate of seven per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$10,541.00. Secured by
Due Sep. 10th, 1896. 9,000 cattle.
P. O. San Antonio, Tex. Mtge. Ind. Ter. & Tex.
Above note signed by J. R. Blocker, and there is written on the face of it in red ink the figures "80613."

Next Note by Interpleader.

No. 279, C 1-2.

SAN ANTONIO, TEXAS, *March 9th*, 1896.

September 17th, 1896, after date, I promise to pay to the order of Evans-Snyder-Buel Co. ten thousand five hundred and sixty-three dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of 7 per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$10,563.00. Secured by
Due Sep. 17th, 1896. 9,000 cattle.
P. O. San Antonio, Texas. Mtge. Ind. Ter. & Tex.
Above note signed by J. R. Blocker.

Next Order Offered by Interpleader.

No. 280, C 1-2.

SAN ANTONIO, TEXAS, *March 9th*, 1896.

September 24th, 1896, after date, I promise to pay to the order of Evans-Snyder-Buel Co. ten thousand five hundred and eighty-five dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of 7 per cent. per annum from maturity until paid.

J. R. BLOCKER.

$10,585.00. Secured by
Due Sep. 24th, 1896. 9,000 cattle.
P. O. San Antonio, Texas. Mtge. Ind. Ter. & Tex.

36 *Next Note Offered by Interpleader.*

No. 281, C 1-2.

SAN ANTONIO, TEXAS, *March 9th*, 1896.

October 8th, 1896, after date I promise to pay to the order of Evans-Snyder-Buel Co. ten thousand five hundred sixty dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of 7 per cent. per annum, from maturity until paid.

J. R. BLOCKER

$10,560.00. Secured by
Due Oct. 8th, 1896. 9,000 cattle.
P. O. San Antonio, Tex. Mtge. Ind. Ter. & Tex.

Next Note Offered in Evidence by Interpleader.

No. 282, C 1-2.

SAN ANTONIO, TEXAS, *March 9th*, 1896.

October 15th, 1896, after date I promise to pay to the order of Evans-Snyder-Buel Co. ten thousand five hundred and eighty-two

dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of 7 per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$10,582.00.	Secured by
Due Oct. 15th, 1896.	9,000 cattle.
P. O. San Antonio, Tex.	Mtge. Ind. Ter. & Tex.

Next Note Offered in Evidence by Interpleader.

No. 283, C 1-2.

SAN ANTONIO, TEXAS, *March 9th*, 1896.

October 20th, 1896, after date, I promise to pay to the order of Evans-Snyder-Buel Co. ten thousand five hundred and ninety-seven dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of 7 per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$10,597.00.	Secured by
Due Oct. 20th, 1896.	9,000 cattle.
P. O. San Antonio, Tex.	Mtge. Ind. Ter. & Tex.

Next Note Offered in Evidence by Interpleader.

No. 321, 126 d., 127.96.

SAN ANTONIO, TEXAS, *M'ch 25th*, 1896.

August 25th, 1896, after date, without grace, I promise to pay to the order of Evans-Snyder-Buel Co. fifty-two hundred and twenty-two dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of seven per cent. per annum, until paid.

J. R. BLOCKER.

$5,223.00.	Secured by
Due Aug. 25th, 1896.	9,000 cattle.
P. O. San Antonio, Tex.	Mtge. Ind. Ter. and Texas.

(In red ink:) Aug. 25. 4102.

37 *Next Note Offered in Evidence by Interpleader.*

No. 322.

SAN ANTONIO, TEXAS, *M'ch 25th*, 1896.

September 30th, 1896, after date, without grace, I promise to pay to the order of Evans-Snyder-Buel Co. fifty-two hundred seventy-eight dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of seven per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$5,278.00.	Secured by
Due Sep. 30th, 1896.	9,000 cattle.
P. O. San Antonio, Tex.	Mtge. Ind. Ter. & Texas.

Next Note Offered in Evidence by Interpleader.

No. 323.

SAN ANTONIO, TEXAS, *M'ch* 25, 1896.

October 28th, 1896, after date, without grace, I promise to pay to the order of Evans-Snyder-Buel Co. fifty-three hundred and twenty-three dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of seven per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$5,323.00.	Secured by
Due Oct. 28th, 1896.	9,000 cattle.
P. O. San Antonio, Tex.	Mtge. Ind. Ter. & Texas.

Next Note Offered in Evidence by Interpleader.

No. 329.

SAN ANTONIO, TEXAS, *May 6th*, 1896.

August 15th, 1896, after date, without grace, I promise to pay to the order of Evans-Snyder-Buel Co. thirty hundred and eighty-seven & $\frac{47}{100}$ dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of seven per cent. per annum from maturity until paid.

J. R. BLOCKER.

$3,087.47.	Secured by
Due Aug. 15th, 1896.	400 steers, 4 yrs. old.
P. O. San Antonio, Tex.	Mtge. Ind. Ter.

Next Note Offered in Evidence by Interpleader.

No. 340.

SAN ANTONIO, TEXAS, *May 6th*, 1896.

September 15th, 1896, after date, without grace, I promise to pay to the order of Evans-Snyder-Buel Co. thirty-one hundred and fifteen & $\frac{8}{100}$ dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of seven per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$3,115.08.	Secured by
Sept. 15th, 1896.	400 steers, 4 yrs. old.
P. O. San Antonio, Tex.	Mtge. Ind. Ter.

38 *Next Note Offered in Evidence by Interpleader.*

No. 344.

SAN ANTONIO, TEXAS, *May 19th*, 1896.

On October 5th, 1896, after date, without grace, I promise to pay to the order of Evans-Snyder-Buel Co. thirty-six hundred forty-one

& $\frac{60}{100}$ dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of seven per cent. per annum, from maturity until paid.

J. R. BLOCKER.

$3,641 60.	Secured by
Oct. —th, 1896.	525 cattle.
P. O. San Antonio, Texas.	Mtges. Ind. Ter.

Next Note Offered in Evidence by Interpleader.

No. 304.

SAN ANTONIO, TEXAS, *M'ch 10th*, 1896.

September 10th, 1896, after date, we, or either of us, promise to pay to the order of Evans-Snyder-Buel Co. thirty-seven hundred eighty-three & $\frac{70}{100}$ dollars, for value received, negotiable and payable at its office, at National stock yards, St. Clair county, Ill., with interest at the rate of 7 per cent. per annum from maturity until paid.

J. R. BLOCKER.
W. H. JENNINGS, JR.
B. F. DARLINGTON.
T. H. SHAW.

$3,783.70.	Secured by
Due Sep. 10th, 1896.	9,000 cattle.
P. O. San Antonio, Tex.	Mtge. Ind. Ter.

MR. STUART: We offer in evidence the writ of attachment in the case of McFadden & Son against Blocker, and the return on the writ, and the same is considered as read in evidence.

Which writ of attachment and the return thereon *is* marked Exhibit "E," and *is* in words and figures as follows, to wit:

In the United States Court in the Indian Territory, Northern District.

WM. McFADDEN & SON, Plaintiffs,
vs.
JAMES W. TAYLOR ET AL., Defendants.

Order of Attachment with Summons.

The President of the United States of America to the marshal for the northern district, Indian Territory:

You are commanded to attach and safely keep the property of the defendants James W. Taylor, A. S. Lyons, E. T. Stephens, J. D. Reed & J. R. Blocker in your district, not exempt from
39 execution, or so much thereof as will satisfy the claim of Wm. McFadden & Son, the plaintiff- in this action for fifty-four thousand one hundred and forty $\frac{45}{100}$ ($54,140.45) dollars, and thirty dollars for the costs thereof; and you are also commanded to

summon the above-named defendants to answer on the first day after the next December term of the United States court in the Indian Territory, northern district, at Muskogee, I. T., being the 3rd day of December, A. D. 1896, a complaint filed against them in said court by the above-named plaintiffs, and warn them that upon their failure to answer, the complaint will be taken for confessed; and also to summon —— —— and such other persons as the plaintiff may suggest, as garnishees to answer in this action on said day at December term of said court.

Witness, the Honorable Wm. M. Springer, judge of said court, and the seal thereof, at Musogee, Indian Territory, this [SEAL.] 17th day of June, A. D. 1896.

JAS. A. WINSTON, *Clerk*,
By —— ——, *Deputy*.

Order of Attachment with Summons.

Marshal's return.

Received this order of attachment with summons, this 17th day of June, 1896, at 4.05 o'clock p. m. and served the same by levying upon the following-described property of the within-named defendant —— ——, to wit: On Monday, June 29th 1896, a large number of cattle as the property of J. R. Blocker, one of the defendants in this case, said cattle being held in the pasture controlled — M. L. Minter, and A. P. McKellop, and other pasture- near Summit, I. T., the number of which cattle was not known, they not having been counted, but which by agreement, signed by all the parties to this suit, said parties being plaintiffs, defendants and interpleaders, it was agreed that the number of said cattle and the brand which they were branded, should be as follows: 820 steers branded 78 on left side, 1,653 steers branded NP on left side, 922 steers branded O K on right side, 515 steers branded T5 on hip and side, 187 steers, branded 77 on left side, 320 steers branded T4 on left side, 198 steers branded T5 on left side; 525 3 & 4 year old steers branded NP or *N* on left side, 1,335 cows branded H5 or T4 or T5 on left side; said parties agreeing by said agreement, a copy of which is hereto attached and made a part of this return, to accept the number of the cattle mentioned above and the brands herein described as the actual number levied upon by the marshal; said agreement specially authorizing the marshal to make his appraisement according to the number and description of said cattle as given above. Pursuant to said agreement I appointed Thos. Johnson and W. R. Whitesides as appraisers who viewed and appraised said cattle at the sum of seventy-five thousand dollars, which appraisement is herewith returned and made a part of this return, said cattle being left in the hands of T. B. McDonald as custodian (?) for same.

On July 14th, 1896, Evans-Snyder-Buel Co. presented their bond as interpleader in this cause in the sum of one hundred and fifty thousand dollars, C. W. Turner, H. B. Spaulding, J. E. Turner,

Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider as sureties thereon, which said bond on same day was duly approved and the marshal directed to turn said catsle over to W. L. Darlington as agent for Evans-Snider-Buel Co., which was done, and said W. L. Darlington's receipt taken and herewith attached and made a part of this return.

S. M. RUTHERFORD,
U. S. Marshal,
By J. S. O'BRIAN, *Deputy.*

On the back of said order of attachment is stamped, written and printed the following, to wit:

Original.

WM. MCFADDEN & SON
vs.
JAS. W. TAYLOR ET AL. } No. 3043.

Order of Attachment.

Writ issued the 17th day of June, 1896.
Returnable the 3 day of December, 1896.
Filed Nov. 20, 1896.

JAS. A. WINSTON, *Clerk.*

Marshal's Fees.

Service	400
Summons appraisers	100
Miles	
Expense in lieu of milage	22315
Total	

Filed Apr. 6, 1897.

JAS. A. WINSTON, *Clerk.*
——— ———, *U. S. Marshal.*
——— ———, *Depety.*
MAXEY & CLAYTON ET AL.,
Attorneys for Plaintiff.

41 It is here agreed by and between counsel for the plaintiffs and interpleader that the property levied on is the same as that described in the mortgages introduced in evidence.

It is also agreed by and between counsel for the plaintiffs and the interpleader that the plaintiffs had actual notice of the mortgages at the time the levy was made. It is also agreed that the attaching creditor, McFadden, had actual notice of the existence of the mortgages introduced in evidence, and which were attempted to be recorded in the northern district of the Indian Territory at the time of the levy of his writ of attachment, and that the mortgages were examined by the counsel for plaintiffs in the attachment suit, and that the description of the property was taken from the same, and all this was before the attachment was issued.

Whereupon the interpleader called AMOS T. ATWATER, who, after being duly sworn as a witness in the case, on his oath testified as follows:

By Mr. STUART:

Question. Mr. Atwater, what is your full name?

Answer. Amos T. Atwater.

Q. Where do you reside?

A. St. Clair county, Ill.

Q. What relation, if any, do you bear to the Evans-Snider-Buel Company, the interpleaders in this suit.

A. Secretary of the company and manager of its St. Louis office.

Q. Please state whether or not your duties as secretary and manager involve and examination and consideration by you of money loaned or advanced in the Indian Territory during the years of 1894, 1895 and 1896?

A. They did.

Q. Do you remember the circumstance of certain money being advanced by the Evans-Snider-Buel Company to Blocker, and mortgages taken by it?

A. I do.

Q. How much money did Evans-Snider-Buel Company advance? Do you know about how —?

A. About $132,000.

Mr. HUTCHINGS: The question is objected to as irrelevant to the issues in this case.

Objection not ruled on.

Judge STUART:

Q. You say you remember of some mortgages being executed?

42 A. Yes, sir.

Q. Please look at these notes (handing witness notes which are set out in the evidence) and say if that is the indebtedness for which the mortgages were executed.

Mr. HUTCHINGS: Plaintiffs admit that fact.

Mr. STUART: Plaintiffs admit that the notes offered in evidence are the evidences of the indebtedness from J. R. Blocker to Evans-Snider-Buel Co., for which the mortgages introduced in evidence were executed to secure.

Mr. STUART:

Q. Mr. Atwater, please state to the court and jury whether, if you know as a matter of fact, whether it was Blocker's money that bought these cattle for which these mortgages were executed, or whether it was money of Evans-Snider-Buel Company.

Mr. HUTCHINGS: Plaintiffs object to the question because it is wholly irrelevant and immaterial to the issues in this case. We admit that the mortgages secured a valid debt, and do not attack it

in any way, and as for what the money was loaned for, or what went with it is wholly immaterial.

Which objection was by the court overruled; to which ruling the plaintiffs duly excepted.

Mr. STUART:

Q. Well, do you know whether the mortgagee in this case advanced the money or not that purchased these cattle? Who advanced it?

A. Evans-Snider-Buel Company advanced the money.

Q. Did the Evans-Snider-Buel Company advance all the money that went into these cattle?

A. Yes, sir; all of it.

Q. Mr. Blocker advance any?

A. Not a dollar that I know of.

Q. Then I understand you, Mr. Atwater, to say that the property in question was purchased with money of Evans-Snider-Buel Company?

A. Yes, sir.

Q. At the time of the issuance of the writ of attachment in favor of McFadden, on the 17th day of June, 1897, was any portion of this mortgage indebtedness unpaid?

43 A. All unpaid.

Q. Do you know about what the aggregate amount of the unpaid indebtedness was?

A. About $132,000.

Q. Now, I understand you to say that that is the indebtedness covered by these mortgages?

A. Yes, sir.

Q. Do you know what the cattle were worth that were covered by the mortgages?

A. The debt represented the cost of the cattle.

Q. Do you know the actual value of the cattle, Mr. Atwater, at the time of the levy of the writ of attachment?

A. We considered them worth the amount of the debt.

Q. Do you know what the cattle sold for when they were placed on the market soon after the levy of the writ of attachment?

A. About a hundred thousand dollars.

Q. Is the debt now unpaid for which these mortgages were executed to you?

A. No, sir.

Q. How is it paid?

A. The debt is unpaid.

Q. Wholly unpaid?

A. Yes, sir, wholly unpaid.

Cross-examination.

Mr. HUTCHINGS:

Q. The cattle have all been sold?

A. Yes, sir.

Q. You mean that you have not applied the proceeds of the sale to Mr. Blocker's indebtedness?
A. Yes, sir.
Q. Do you know, Mr. Atwater, how many cattle Blocker at that time had in these pastures?
A. About 7,000 head.
Q. Do you know whether he had any more or not?
A. I do not.
Q. Do you know whether he had any other upon which your firm did not have mortgages?
A. I do not.
Q. You don't know as to that?
—. No, sir.

Witness excused.

Whereupon the interpleader called JOHN R. BLOCKER, who, after being duly sworn as a witness in the case, on his oath, testified as follows:

44 Mr. STUART:

Q. What is your name?
A. J. R. Blocker.
Q. Are you the J. R. Blocker who executed certain mortgages to Evans-Snyder-Buel Co.?
A. Yes, sir.
Q. I mean the mortgages that have *have* been introduced in evidence in this case?
A. Yes, sir.
Q. Where were those mortgages executed?
A. San Antonio, Texas.
Q. Do you remember where the property was located upon which these mortgages were executed?

Mr. HUTCHINGS: The mortgages speaks for themselves.
Mr. STUART: All I want to prove is that the property in controversy and secured by the mortgages was in the Indian Territory.
It is here admitted by the counsel for the respective parties, that the cattle mentioned in the first two mortgages read in evidence, being Exhibit A and B, were in the Indian Territory, and in the northern judicial district at the time of the execution of the mortgages, and that the cattle mentioned in the mortgages put in evidence as Exhibits C — D, were in Texas at the time of the execution of those mortgages—at the time of the execution and registration of those mortgages.

Mr. STUART:

Q. Mr. Blocker, of what State were you a citizen at the time you executed these mortgages, and at the time the same were recorded in the northern district of the Indian Territory?
A. The State of Texas.

Q. And a resident of the State?
A. Yes, sir.
Q. I understand you to say that the cattle upon which the two first mortgages were executed were in the Indian Territory at the time you executed the mortgages?
A. Yes, sir.
Q. And in the northern district?
A. Yes, sir.
Q. Please state whether or not the cattle which were seized were the same cattle which were covered by the mortgages?
A. Yes, sir.
45 Q. The four mortgages introduced in evidence?
A. Yes, sir.

Cross-examination.

Mr. HUTCHINGS:

Q. Mr. Blocker, did those mortgages cover all the cattle you had in that pasture, the McKellop pasture, and all those pastures down there mentioned in the mortgages?
A. Yes, sir.
Q. Did a man by the name of Jennings have some cattle in one of the same pastures in which those were?
A. Yes, sir.
Q. You interested with him?
A. No.
Q. Did Mr. Coleman likewise have some cattle in the pasture in which you had those?
A. No, sir.
Q. Were you interested with Mr. Coleman in some cattle?
A. No, sir.
Q. How much of your money own did you put into those cattle?
A. Not a dollar.
Q. You had been pretty successful with cattle the year before?
A. Yes, sir.
Q. What had you done with your money then?
A. Paid debts with it.
Q. You been doing that right along?
A. Yes, sir.

Witness excused.
The interpleader, who is the plaintiff in this case, rests.

Mr. HUTCHINGS: We now renew our objection to the evidence offered to show that the money which was represented by these notes, and loaned to Mr. Blocker, was invested in the cattle upon which the mortgages *was* given, and that said money represented by those notes was the purchase price of said cattle, and ask that all evidence pertaining to this matter be withdrawn from the consideration of the jury.

The court overruled said objection, to which ruling of the court the plaintiffs, McFadeen & Son, duly excepted.

Mr. HUTCHINGS: We now offer in evidence the record of the judgment in the case of Wm. McFadden & Son against Blocker,
46 and the record sustaining the attachment of the same. The same being introduced is considered read.

Which record of judgment, above offered in evidence, is marked Exhibit "E," and is in words and figures as follows, to wit:

THE UNITED STATES OF AMERICA, *ss:*

United States Court, Indian Territory, Northern District.

At a stated term of the United States court, in the Indian Territory, northern district, begun and had in the court-rooms at Muscogee, in the Indian Territory, on the first day of Dec., in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States of America one hundred and twenty-one, 121.

Present, the Hon. William M. Springer, judge of said court.

On the 27th day of January, 1897, being a day of the regular Dec. term, 1896, among the proceedings had were the following, to wit:

WM. MCFADDEN & SON
vs.
J. R. BLOCKER ET AL.

Interplea of Evans-Snyder-Buel Co. Filed.

And on the 29th day of January, 1897, the same being a regular day of the said term of said court, the following proceedings were had, to wit:

WM. MCFADDEN & SON, Plaintiffs,
vs.
J. R. BLOCKER, Defendant. } No. 3043.

Now on this day this cause coming on to be heard upon the complaint of the plaintiffs, and it appearing to the court that the defendant J. R. Blocker had been duly served with process in this cause as the law directs and he having failed to plead, answer or demur to plaintiffs' cause of action, and no one appearing for him he is considered in default; and it further appearing to the court that at the commencement of this action there was an attachment sued out against the defendant on the grounds that he was a non-resident of the Indian Territory, and said defendant, J. R. Blocker, having failed to answer or controvert the grounds of said attachment, and made no defense herein either as to the debt or as to the grounds of the attachment and it appearing to the court from a transcript of a judgment attached to plaintiffs' complaint which was recovered against the defendant, J. R. Blocker, on the 26th day of May,
47 1887, in the district court of Jefferson county, Texas, that said defendant, J. R. Blocker, is indebted to the plaintiffs upon said judgment in the sum of fifty-five thousand eight hundred and

seventy-five and seventy-one one-hundredths ($55,875.71) dollars, and that no part of said judgment has been paid:

It is therefore considered, ordered and adjudged that the plaintiffs, Wm. McFadden and W. P. McFadden, copartners, doing business under the firm name and style of William McFadden & Son, have and recover of and from the defendant, J. R. Blocker, the sum of $55,875.71 and the costs of this suit together with ten per cent. interest thereon from this date, for which let execution issue.

And it is further considered, ordered and adjudged by the court that the attachment sued out by the plaintiffs against the defendant, J. R. Blocker at the commencement of this suit be and the same is sustained hereby.

And it appearing to the court that the Evans-Snyder-Buel Co. have interplead in this cause, claiming the property levied on under the writ of attachment sued out by the plaintiffs and levied upon as the property of J. R. Blocker and that said interplea is yet undisposed of and waiting trial thereon and the plaintiffs having filed their application in due form for a change of venue of this cause to one of the other places of holding court in the northern district, said cause is hereby transferred to Tahlequah, one of the places of holding court in the said district and plaintiffs are given until the first day of next term of court to be held at Tahlequah, to plead, answer or demur to said interplea.

The defendant in the trial of the issues of the interplea here rests its case.

(This is all the evidence given in the trial.)

Mr. STUART: Now at the close of all the evidence in the case, the plaintiffs in the interplea, ask the court to instruct the jury to return a verdict in this case for the interpleader, Evans-Snyder-Buel Co.

Mr. HUTCHINGS: Now at the close of the testimony in this case the plaintiffs moves the court to instruct the jury to return a verdict for the plaintiffs in the original suit, and the defendants, in the interplea, and that it appearing in the evidence that the cattle for which the interpleader gave its bond have been sold, and that they were in value largely in excess of the debt of the defendant that they find, not only that the property at the time of the
48 levy was the property of J. R. Blocker, but find in favor of the plaintiffs in the original suit the amount of their judgment and interest to date.

Which motion of said defendants in the interplea, Wm. McFadden & Son, the court overruled, to which said ruling the defandants, Wm. McFadden & Son duly excepted.

Whereupon the court sustained the motion of the interpleader, the Evans-Snider-Buel Co., to direct the jury to return a verdict in its favor, and instructed the jury to return a verdict for the interpleader, Evans-Snider-Buel Co. To which ruling of the court the defendants in the interplea, Wm. McFadden & Son duly excepted at the time, and still except.

Mr. STUART: We will agree in this case—

It is agreed by the attorneys for the intervenor, in open court, that in case the judgment in this court shall be in favor of the intervenors and against the plaintiffs, McFaddins, that if the court of appeals for the Indian Territory shall reverse said judgment, that it may, at the same time, render judgment in favor of the plaintiffs, McFaddins, for the amount of plaintiffs' demand, as shown by the judgment in this case, and for costs.

This agreement is made with the understanding that it shall not operate to our prejudice in case we should desire to appeal from that judgment.

Mr. HUTCHINGS: It is agreed by counsel for plaintiffs that they shall not be prejudiced in their right to appeal to any court that shall have jurisdiction of such appeal.

Whereupon the jury returned the following verdict, to wit:

McFADDEN
vs.
J. R. BLOCKER; EVANS-SNYDER-BUEL Co., Interpleaders.

"We the jury do find from the law and the evidence the issues herein involved in favor of the interpleaders, Evans-Snider-Buel Co., and against the plaintiffs.

JOHN DUPONT, *Foreman.*"

And thereafter, to wit, on the same day the defendants in the interplea, Wm. McFadden & Son, filed *its* motion for a new trial, which said motion is in words and figures as follows, to wit:

49 In the United States Court for the Indian Territory, Northern District, Sitting at Wagoner.

W. P. H. McFADDIN and W. P. H. McFADDIN & J. A. McFADDIN, Ex'ors of Wm. McFaddin, Plaintiffs,
vs.
J. R. BLOCKER ET ALS., Def't-, and EVANS-SNIDER-BUEL Co., Interpleaders.

Comes now the plaintiffs and move the court to set aside the verdict and grant a new trial on the issues of the interplea and for grounds therefor says:

1st. That the court erred in directing a verdict in favor of the interpleader.

2nd. That the verdict of the jury is contrary to law.

3rd. That the court erred in overruling the objections to the introduction in evidence of Exhibits A, B, C, & D, and the statements of the witness Atwater that the money loaned and secured by the mortgages was the purchase-money of the cattle levied on.

R. E. GREER,
WILLIAM T. HUTCHINGS,
MAXEY & CLAYTON,
Att'ys for Plaintiffs.

Which motion being overruled by the court, the plaintiffs at the time duly excepted.

It is therefore considered, ordered and adjudged that the interpleaders, Evans-Snider-Buell Company, do have and recover of the plaintiffs, individually, W. P. H. McFaddin, and W. P. H. McFaddin and J. A. McFaddin, executors of the estate of Wm. McFaddin, deceased, and the defendant J. R. Blocker, the property levied upon by virtue of the attachment in this cause, and described in the officer's return and the interplea herein, and all costs in this behalf expended, for which let execution issue.

Whereupon the defendants in the interplea pray and appeal and the court doth grant said prayer; and it is ordered and adjudged by the court here that the desendants in the interplea, W. P. H. McFaddin *et al.*, be and they are hereby allowed to appeal from the judgment herein rendered at the present term of this court, to the United States court of appeals for the Indian Territory.

Wherefore plaintiffs pray that this their bill of exceptions
50 be signed, sealed and made a part of the record in this case, which is accordingly done.

This 17th day of May, 1899.

WM. M. SPRINGER,
Judge United States Court, Northern District, Ind. Ter.

O K.

S. S. FEARS,
Attorneys for Interpleader.

Bill of exceptions endorsed: "Filed May 17, 1899. Jas. A. Winston, clerk."

UNITED STATES OF AMERICA, }
Indian Territory, Northern Judicial District, } *ss:*

I, James A. Winston, clerk of the United States court in the Indian Territory, in and for the northern district thereof, do hereby certify that the within and foregoing transcript is a full, true and correct transcript of the record and proceedings, and all things, as far as called for, concerning the cause numbered 251, and entitled Wm. McFaddin & Son, plaintiffs, and J. R. Blocker *et al.*, defendants, and Evans-Snider-Buel Company, interpleaders, as the same appears to me from the records and files of my office at Wagoner.

Witness my hand and the seal of said United States court, on this the 20th day of May, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

JAS. A. WINSTON, *Clerk.*

United States Court, Northern District, Muscogee,
in the Indian Territory.

51 *Appendix.*

In the United States Court for the Indian Territory, Northern District, at Wagoner, Ind. Ty., May 13, 1899.

W. P. H. McFADDIN ET AL.
vs.
J. R. BLOCKER ET AL., Def'ts; EVANS-SNIDER-BUEL CO., Interpleader. } No. 251.

Opinion of the Court.

William M. Springer, judge, presiding.

If the questions presented in this court at this time were the same as those presented when this case was tried at Tahlequah my duty would be clear and free from any embarrassment whatever. I believe that it is the duty of the trial court to respect and carry out the opinions of the court of appeals, or the higher courts in a case at bar, and in all cases where the questions presented are similar, to observe that rule unhesitatingly.

As to the validity of the act of Congress, approved Feb. 3, 1897, entitled "An act relating to mortgages in the Indian Territory," I entertain the same view that I expressed when this case was tried at Tahlequah, but the court of appeals, on this question, has overruled that opinion, and if that were the turning point this time, as it was the turning point then, in my judgment, I should bow with deference to the superior court and sustain the contention, that this law was not retroactive and did not validate the mortgages in question. I say that I should feel it my duty to do that, altho' my mind has not changed in the least.

If now I should direct the jury to return a verdict for the plaintiffs, McFaddin & Sons, and against the interpleader it might, with propriety, be said in the court of appeals when this case comes up for argument, that the trial court had heard the contention of the counsel for the interpleader in this case, and had overruled that contention as presented in this trial. This argument was not presented or suggested at that time; nor did it occur to Judge Clayton. I am satisfied of this, because I have discussed the matter with him frequently, and I believe now, as firmly as I believe anything that exists of which I have knowledge, that if Judge Clayton's attention had been called, at the time, to this opinion, in which he
52 stated that non-resident mortgages were proscribed by this act, that he would have seen at once that such a proscription was in violation of the Constitution of the United States.

There can be no greater privilege in this western country than the right to borrow money and use that money to buy cattle and bring them into the Indian Territory, and in these Western States, and pasture them until they are ready for the market. Hundreds and thousands of men are engaged in that business, and vast fortunes have been built up in it.

As far as Blocker is concerned, it is my opinion that under section 2, article 4, of the Constitution of the United States, the same privilege that Congress grants a resident of the Indian Territory, the Constitution confers upon the residents or citizens of the States, and that doctrine is well established and recognized in all the States of the Union. If Judge Clayton's attention had been called to this I am certain he would have said, in regard to the Arkansas law, in so far as it makes a discrimination, it is void, because he is a loyal citizen of this country, and believes in the Constitution of the United States, and would go as far to uphold it, when his attention is called to it, as any other judge of the United States.

The case as now presented to this court differs so materially from the case which was presented to the court of appeals, and the argument at this time raises such new and important questions that it cannot be said that the doctrine of *stare decisis* applies. As stated in Sutherland on Stat. Const., sec. 316:

"No absolute rule can be given as to when *stare decisis* is imperative, so much depends on the particular case in which it may be invoked. For, it must be confessed, that hasty and ill-considered decisions are sometimes made, and even of such nature to become rules of property; decisions so obviously against law that they ought, in vindication of the law, to be overruled, and in a multitude of instances have been." (See Chestnut *v.* Shane, 16 Ohio, 599, and other cases cited in note to said section.) In concluding the section the author states:

"This rule has never been carried so far as to preclude courts from investigating former decisions when the question has not undergone repeated examination and become well settled."

In section 317 Mr. Sutherland says:

"The two grounds of justification in departing from even a single decision which has become a general rule of property within a certain line of dealing, are (1) the necessity of preventing further
53 injustice; (2) the necessity of vindicating clear and obvious principles of law."

These authorities seem to me, not only to authorize, but require this court to disregard the decision of the United States court of appeals for the Indian Territory in this case; believing as I do, as the case is now presented to this court, and as it will be presented again to the court of appeals, that the opinion which the court will now submit will be concurred in by the entire court. In this opinion handed down by the court of appeals for the Indian Territory there are certain propositions laid down to which I desire to call attention at this time. On page 1045 of volume 48 of S. W. Reporter, Mr. Justice Clayton, speaking for the court, said:

"One of the contentions of the learned counsel for the interpleader, in their brief, is that, inasmuch as there was no statute here providing for the recording of mortgages executed by non-resident mortgagors, the common law would prevail as to them. There are two answers fatal to this contention: First, Congress having enacted a statute relating to the recording of these instruments of writing, and having omitted to provide for the recording of such mortgages,

the maxim, '*Expressio unius est exclusio alterius*,' will prevail. And, second, at common law a mortgage valid against creditors could only be made by a delivery of the property. It was essential that the custody and possession of the property should be delivered to and retained by the mortgagee. The intent of the statute providing for the recording of mortgages of personal property was to do away with the necessity of any delivery of the property, and to enable mortgagors to hold possession until default. For this purpose registration is required, as giving, perhaps, even greater notoriety to the transaction than delivery and retention of possession. Registration thus becomes a substitute as well for delivery as for retaining possession of the property. Jones Chat. Morg. No. 176. No delivery of the property having been made to the mortgagee in this case, and the possession thereof having been retained by the mortgagor, it is evident that the mortgagee, the interpleader, is in no better condition by considering his mortgage as at common law. Under the statute he is simply the holder of an unrecorded mortgage. At common law he is the holder of a mortgage without delivery of possession of the mortgaged property. The one is the equivalent of the other. As against creditors in either case, they are fraudulent and void."

Quoting further from that opinion on page 1047, referring to the mortgage law of the State of Arkansas, section 4742 of Mansfield's Digest, as put in force in the Indian Territory, Judge Clayton said:

"This statute has been the law of Arkansas from the time
54 it was admitted as a State of the Union. As evidenced by that act, for more than half a century the policy of that State has been to forbid the record of mortgages executed by non-resident mortgagors. They were a proscribed class, who, at least as against third persons, could only create a lien on personal property by turning over possession to the mortgagee; and when that statute, by act of Congress of May 2, 1890, was extended over this Territory, it came to us granting the same rights, enjoining the same restrictions, enforcing the same policy, and subject to the same constructions, as in the State from which it came."

"The act of Congress of February 3, 1897, evidenced a change of policy of the Government. A non-resident mortgagor was taken from the proscribed class, a new right was given to him, and, if the latter clause of this act is to be construed as retroactive, it was not to cure a pre-existing defect, either of law or of fact, because, under the law as it then stood and the facts of this case, no defect existed, but it was intended, after conferring the new right, that the benefits to be derived from it should be extended to cover past acts and transactions which at the time they were performed, were against public policy and forbidden by law."

Special reference is directed to the following propositions stated in the above extracts. First, that at common law, a chattel mortgage to be valid against creditors could only be made by delivery of the property, and, secondly, that under the mortgage law of Arkansas, put in force in the Indian Territory, non-resident mortgagors were a proscribed class, and that they could only create a lien upon their

personal property by turning over the possession to the mortgagee, and that by the curative act of February 3, 1897, the non-resident mortgagor was taken from the proscribed class and a new right was given to him by this act of Congress.

As to the first proposition stated above, that at common law a chattel mortgage, to be valid against creditors, could only be made by a delivery of the property to the mortgagee, and a retention by him of the property. The opinion of the court of appeals, as shown by the above extracts, was to the effect that, the interpleader in this case was in no better condition by having his mortgage than he would have been at common law. As stated by the court, under the statute he was simply the holder of an unrecorded mortgage, and at common law mortgages of personal property without delivery or possession of the mortgaged property, and as against creditors in either case, the opinion states "were fraudulent and void."

Especial attention is called to chapter 5 in Bump on Fraudulent Conveyances, beginning at page 61 and ending with page 131. In this chapter the learned author has exhaustively considered
55 the authorities upon this subject, both English and American, and states his conclusion to be that the preponderance of the authorities is at the present time in favor of the doctrine, that possession of personal property by a vendor, after sale, is only *prima facie* evidence of fraud. On pages 74 and 75, of Bump on Fraudulent Conveyances, the rule is stated as follows:

"The doctrine that the retention of possession will, under all circumstances, render a transfer of personal property fraudulent and void has not been laid down by any court, nor adopted anywhere. There are admitted exceptions to the rule, varying in number and character according to the strictness with which the rule is administered. But evidence is either *prima facie* or conclusive. If evidence is liable to be contradicted or explained it is only *prima facie*, but conclusive evidence cannot be contradicted."

Concluding this paragraph the author states:

"It follows, then, that in every case the vendee may, if he can, show by evidence special reasons to take his case out of the general rule. The fact of possession in the vendor, as it may be explained, is, therefore, not conclusive, but only *prima facie* evidence of fraud." (See also Hall *v.* Tuttle, 8 Wend., 375.)

In a note on page 130 of Bump on Fraudulent Conveyances, is this statement:

"The doctrine in the text is laid down according to the principles of the common law, but these, of course, are liable to modification by the statutes, of the various States."

The note further says:

"These acts of the several States commonly relate to bills of sale and mortgages of personal property, and are designed to prevent the mischiefs that may arise from secret sales, and hence require that such transfers shall be recorded in all cases where the grantor retains the possession."

A list of the States having such statutes is set forth in the note, and the peculiarities of some of the statutes.

Any person who will read this chapter from Bump on Fraudulent Conveyances will be forced to the conclusion that the preponderance of authorities, as stated by Mr. Bump, at the present time, is in favor of the doctrine that possession of personal property by the mortgagor, after sale, is only *prima facie* evidence of fraud, and that this presumption may be rebutted, and when rebutted the sale is valid, although possession is retained by the vendor.

56 In the case at bar, under the evidence as presented on this trial it is shown conclusively, and even admitted by counsel for plaintiffs, that the transaction between the interpleader and Blocker was free from even the suspicion of fraud, and by the evidence it is shown that the intervenor furnished Blocker with the money, secured by the notes and mortgages in question, with which the cattle seized by the attachment of the plaintiffs were purchased, that it was money borrowed from the intervenor, and that the mortgages in question were given by Blocker to secure the money thus advanced, and with which the cattle in question were purchased in the State of Texas.

We are not left in doubt as to the doctrine on this subject which prevails in this jurisdiction. In the case of Pyeatt *et al. vs.* Powell, decided by the circuit court of appeals for the eighth circuit at St. Louis, July 25, 1892, reported in vol. 2, C. C. A. page 367, Mr. Justice Sanborn, speaking for the entire court, said:

"The rule of the common law is that a mortgage of personal property, unaccompanied with possession, is *prima facie* void as to creditors of the mortgagor; yet the presumption of fraud arising from that circumstance may be rebutted by explanations showing the transaction to be fair and honest, and giving a reasonable account of the retention of possession." Citing Ryall *v.* Rolle, 1 Atk., 165, 168; Alton *vs.* Harrison, L. R. 4 Ch. App., 622, 626; Martindale *v.* Booth, 3 Bunn & Adol., 498, 506; Hauselt *v.* Harrison, 105 U. S., 401; Warner *v.* Norton, 20 How., 448, 460; Martin *v.* Ogden, 41 Ark., 191, 192; 2 Kent, Comm., 521.

The Pyeatt case arose in the Indian Territory, and was taken on appeal to the circuit court of appeals for the eighth circuit from the United States court in the Indian Territory, before the establishment of the court of appeals in this Territory. The case arose in 1889, and was decided prior to the passage of the act of May 2, 1890, which extended the mortgage laws of Arkansas over the Indian Territory. There was at that time no law in the Indian Territory fixing a place for the recording of mortgages of any kind. Referring to this fact the circuit court of appeals in that opinion stated as follows:

"What was the law in the Indian Territory on this subject in 1888 and 1889? Prior to the passage of the act of Congress of May 2, 1890 (26 U. S. St., p. 24), extending over this Territory certain statutes of the State of Arkansas, there was no statute in operation in this Territory upon any subject outside of those treated in the acts of the Congress regulating intercourse with the Indians and punishing offenses against the United States. In the United States,

in the absence of statutes, the presumption of the existence of
57 the common law prevails in all the territory of the original colonies, and in all newly acquired territory originally settled by Englishmen or their American descendants; but this presumption may not prevail in the Indian Territory, because, before its purchase by the United States, it was a part of a territory settled by the subjects and governed by the laws of other nations."

The court stated further:

"There is, however, another well-settled principle, found in reason and authority, upon which, in the Federal courts, the common law must be held to govern the rights of these parties. It is that the *lex fori*, or, in other words, the laws of the country to whose courts the party appeals for redress, furnish in all cases, *prima facie*, the rule of decision. Monroe *v.* Douglas, 5 N. Y., 452; the Scotland, 105 U.S., 24, 30, 31; Garner *v.* Wright, 52 Ark., 388; 12 S. W. Rep.; Norris *v.* Harris, 15 Cal., 254. In the Federal courts, in the absence of statutes repealing or modifying it, the common law is the rule of decision and guide of action; and when by the act of March 1, 1889, (25 U. S. St., p. 783,) the Congress, with the assent of the Indians, created the court below for the Indian Territory, and conferred on it jurisdiction in all civil cases between citizens of the United States who are residents of the Indian Territory, or between citizens of the United States, or of any State or Territory, and any citizen of or persons residing or found in the Indian Territory, when the amount in controversy was $100 or over, we hold that it gave that court authority, and imposed upon it the duty, to apply the established rules and principles of the common law to the adjudication of those cases of which it was thus given jurisdiction, where, as in this case, no proof is made of the laws, rules or customs obtaining in that Territory."

In the Pycatt case, *supra*, decided by the circuit court of appeals for the eighth circuit, the court below instructed the jury that the possession of the property by the mortgagor was not inconsistent with the terms of the mortgage, and that if the jury believed from the evidence that McClelland was justly indebted to Powell in the sum of money for which the two notes read in evidence were executed, and that the mortgage was given in good faith to secure the payment of the said notes, and that the plaintiff had actual knowledge and knew of said mortgage before bringing their suit and obtaining their judgment against the mortgagor, McClelland, then the mortgaged property should not be held subject to their execution, and the jury should find for the plaintiff, Powell.

The other instructions were in accordance with this doctrine.
58 The appellants in that case insisted that these instructions were erroneous, but the circuit court of appeals overruled their contention and held that no error had been committed by the trial court in the Indian Territory. The court further held, after reviewing these contentions, as follows:

"It is clear that under this evidence and these concessions there was no question about the validity of the debt, or the fraudulent character of the mortgage as to creditors, to be submitted to the jury, and hence there could have been no prejudicial error in the instruc-

tions we have been considering. A chattel mortgage, not fraudulent as to creditors, made in good faith, to secure an honest debt, is at common law superior to a subsequent attachment of the same property by a creditor of the mortgagor;" and further that court held:

"It is true that it was not material whether the defendants were or were not notified of this mortgage after their debt accrued and before they brought suit; but the charge of the court that this mortgage entitled the plaintiff to recover, if defendants were notified of it before suit, could do the defendants no injury, because, under the admissions as to its character, the mortgage entitled him to recover whether the defendants were notified of it or not."

In view of this opinion of the circuit court of appeals for the eight circuit, an opinion which is binding upon this court, in so far as it is applicable to any case pending in this court, the statement in the opinion of the court of appeals for the Indian Territory, that the interpleader in the case at bar was simply the holder of an unrecorded mortgage, and at common law a mortgage, without delivery of possession of the mortgage property, was fraudulent and void, is untenable and the error committed by our court of appeals is so patent that upon a review of this case there can scarcely be a doubt that the court will reverse the opinion which was handed down in this case. Conceding, as held by our court of appeals, that the intervenor in the case at bar was left with an unrecorded mortgage in his hands, and was subject to the rule of the common law; and, conceding further, in view of the evidence in this case that it is free from fraud of any kind, that it secured an honest debt, and the whole transaction was in good faith, the doctrine laid down by the circuit court of appeals for the eighth circuit in the case of Pyeatt *vs.* Powell determines this case authorit-ively in favor of the intervenor. The opinion of the circuit court of appeals for the eighth circuit upon this subject is clear, unambiguous, and in this jurisdiction authoritative. It is in short as follows: A chattel mortgage, not fraudulent as to creditors, made in good faith, to secure an honest debt, is at common law superior to a subsequent attachment
59 on the same property by a creditor of the mortgagor.

The second proposition laid down by the court of appeals for the Indian Territory, in the opinion rendered in this case, was to the effect that the mortgage law of Arkansas as put in force in the Indian Territory proscribed non-resident mortgagors. The court of appeals in the Indian Territory held that this statute forbid the recording of mortgages executed by non-resident mortgagors, and held that they were a proscribed class who, at least, as against third persons, could only create a lien on personal property by turning over the property to the mortgagee. And further the court of appeals in the Indian Territory held that the curative act of Congress of February 3, 1897, took non-resident mortgagors out of the proscribed class and conferred upon them a new right, namely, the right to have their mortgages recorded at a place designated.

The mortgage law of Arkansas, Mansfield's Digest, section 4742, failed to make any provision for a place at which the mortgages on

personal property of non-resident mortgagors could be filed and recorded. The only provision was for the filing and recording of mortgages on personal property in the county in which the mortgagor resided, or, in other words, confined the privilege of filing and recording to resident mortgagors. Under the decision of the supreme court of Arkansas in the case of Main *vs.* Alexander, 9 Ark., 112, and in Jacoway *vs.* Garrett, 20 Ark., 190, and in Hanna *vs.* Carrington, 15 Ark., 105, it was held by the supreme court of that State that a mortgage is good between the parties though not recorded, but it constitutes no lien on mortgaged property as against strangers unless acknowledged and recorded, even though they may have actual notices of its existence. This mortgage law of Arkansas was imported into the Indian Territory with that construction upon it, which is doubtless correct. When Congress put this law in force in the Indian Territory it was to be given the same construction as was placed upon it by the supreme court of Arkansas. This statute then raised the question as to whether under article 4, section 2, of the Constitution of the United States, either the State of Arkansas or the United States could pass a valid law proscribing the rights of non-residents of the State of Arkansas, or of non-residents of the Indian Territory, as compared with rights which were enjoyed by citizens of the State, and by residents of the Indian Territory. Article 4, section 2 of the Constitution of the United States reads as follows:

"The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

Mr. Justice Washington in Corfield *vs.* Coryell, 4 Wash.
60 (U. S.), 371, in construing the meaning of the words, "privileges and immunities" as used in this section of the constitution said:

"The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union, from their time of becoming free, independent and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the Government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole." And see Ward *vs.* Maryland, 12 Wall. (U. S.), 430, where this definition (if it can be so termed) is approved. Mr. Justice Miller in the Slaughterhouse cases, 16 Wall. (U. S.), 76, said, with reference to these observation- of Mr. Justice Washington: "The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted." In the case of Paul *vs.* Virginia, 8 Wall. (U. S.), 180, the court, in expound-

ing this clause of the Constitution, says that "the privileges and immunities secured to citizens of each State in the several States by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens." See also *In re* Parrott, 1 Fed. Rep., 504.

In Ward *vs.* Maryland, 12 Wall. (U. S.), 418, Mr. Justice Clifford said: "Beyond doubt, those words (privileges and immunities) are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation, to acquire personal property, to take and to hold real estate, to maintain actions in the courts of the State, and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens."

"Article 4, section 2, of the United States Constitution, did not, said Miller, J., in the Slaughter-house cases, 16 Wall. (U. S.), 36, create those rights which it called immunities of citizens of
61 the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens. Its sole purpose was to declare to the several States that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restriction on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction." (See further American and English Enc. of Law, 2nd ed., vol. 6, pp. 70, 71, 72, and 73, and authorities therein cited.)

The State of Indiana in 1881 passed a law which provided: "It shall be unlawful for any person, association, or corporation to nominate or appoint any person a trustee in any deed, mortgage, or other instrument in writing (except wills), for any purpose whatever, who shall not be at the time a *bona fide* resident of the State, and it shall be unlawful for any person who is not a *bona fide* resident of the State to act as such trustee."

The validity of this act was in 1892 passed upon by the supreme court of Indiana, and that court held that this act of the legislature of Indiana was in conflict with the Constitution of the United States, article 4, section 2, which declares that the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States. The opinion in that case quotes an opinion of Judge Gresham in The Farmers' Loan & Trust Co. *vs.* Chicago & Alton R'y Co., 27 Fed. Rep., 146, in which Judge Gresham said of this statute of Indiana:

"'It is a statute which denies to residents of other States the right to take and hold in trust, otherwise than by last will and testament, real and personal property in Indiana. The right is asserted to deny to persons, associations, or corporations, within or without the State, power to convey to any person in trust, not a resident of In-

diana, real or personal property within the State. This is a plain discrimination against the residents of other States. If Indiana may disqualify a resident of another State from acting as trustee in a trust deed or mortgage which conveys real or personal property as security for a debt due to himself and other creditors, it would seem that the State might prohibit citizens of other States from holding property within the State, and to that extent from doing business within the State. No State can do the latter. A person may, and frequently does, acquire property interest by a conveyance to him in trust. A citizen of the United States cannot be denied the right to take and hold absolutely real and personal property in any State of the Union, nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others. This right is incident to national citizenship."

62 In the State of Indiana, it will be seen that non-resident trustees of real or personal property were a proscribed class, as declared by the statutes of that State, but the supreme court of that State held this proscription to be void and of no effect. The opinion of Judge Gresham on that statute is equally applicable to the statute of Arkansas, in reference to mortgages as construed by the court of appeals for the Indian Territory. The non-resident mortgagor was put in the proscribed class by both these statutes, and both of them must fall as being contrary to the Constitution of the United States.

The definition of the word privilege given by the law dictionaries is this, "A peculiar right or favor granted by law contrary to the common rule."

The right to record a mortgage on personal property, and by such record make that mortgage a lien in favor of the mortgagee is not only a peculiar right or favor granted by the law, but it is one of great pecuniary value.

Upon that right or privilege depends transactions in the Western States involving many millions of dollars, and to destroy that privilege or right would be as disastrous to commerce and trade in the Western States, and in the whole country, for that matter, as a cyclone or a civil war.

It must be conceded that this is a valuable privilege, and being such it is secured by article 4, section 2 of the Constitution of the United States to the citizens of each State in the Union, and the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States.

As stated by Mr. Justice Miller in the Slaughter-house cases, the sole purpose of this constitutional provision was to declare to the several States that "whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within the jurisdiction of the State making the provisions."

The mortgagor in this case was a citizen of the State of Texas as disclosed by the evidence. He had a right under the Constitution and laws to come into the Indian Territory and bring his property

into the Indian Territory, and when here, he was entitled to all the privileges and immunities that the law of Congress conferred upon the residents of the Territory. Congress has conferred upon the residents of the Territory a great and valuable privilege, that of recording their mortgages on personal property and making
63 them liens for the security of their debts, and had made no provision for recording the mortgages of the defendant in this case, who was a citizen of the State of Texas. He was therefore le-t where the common law placed him, and without the recording of that mortgage, if it were *bona fide* and secured and honest debt, it was a lien as against attaching creditors, without being filed and recorded. That privilege cannot be denied to him under the Constitution. His privilege was equal to that, and the same as that which was enjoyed by the residents of the Territory. It will be observed that this provision is in the original Constitution. It is not in this connection a restriction upon the States, but by the 14th amendment the same principle was made a restriction upon the power of the States; but it is found in the Constitution itself, and is a limitation upon the power of Congress. Congress cannot pass a law which would deprive the citizens of one State of the equal privileges and immunities of the citizens of the several States. When Congress gave to the residents of the Indian Territory the power to record their mortgages and make them liens for the security of their debts, the citizens of Texas, and of all of the States of the Union, unquestionably had the same privilege conferred upon them. While Congress failed to make a place for recording mortgages of non-residents, the right remained unimpaired in the citizens of all the States to enjoy the same privilege and the same rights with their mortgages as *was* enjoyed by the residents of the Territory in reference to their mortgages. Congress having failed to provide a place for the non-resident's mortgage to be filed and recorded, it was as good in his hands, without recording, as was the mortgage of the resident which was placed upon record, and secured to the mortgagor and the mortgagee the equal rights and the equal benefits which the recorded mortgages of the residents of the Territory had and secured.

It may be contended that the Constitution of the United States is not in force in the Indian Territory so as to place this Territory, and the residents thereof, upon an equal footing with the citizens of the States, so far as their rights to enjoy equal privileges and immunities, but that contention is settled by the act of Congress, approved May 2, 1890 (26 U. S. St., p. 94). In the last paragraph of section 31 of that act it is provided as follows:

"The Constitution of the United States, and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, and all laws relating to national banking associations shall have the same force and effect in the Indian Territory as elsewhere in the United States."

One of the great and fundamental principles of our Gov-
64 ernment is the equality of all men before the law. This

great principle was enunciated in the Declaration of Independence, as follows:

"We hold these truths to be self-evident that all men are created equal."

This does not mean equal physically, intellectually, morally or socially, but it means equal under the law. It was engrafted in the Federal Constitution in section 2 of article 4. It was embraced in the 14th amendment to the Constitution, wherein it was declared:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and the State wherein they reside. No State shall make or inforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It was further secured to the people by the civil-rights law, approved May 31, 1870. Section 1979 of the Revised Statutes of the United States provides as follows:

"SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

And section 5510 of the Revised Statutes of the United States provides as follows:

"SEC. 5510. Every person who, under color of any law, statute, ordinance, regulation or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains or penalties, on account of such inhabitant being an alien, or by reason of its color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both."

The foregoing provisions clearly indicate and establish that in this Government any law which deprives any class of persons who are under the protection of the United States from the enjoyment of equal privileges and immunities of others of another class of citizens, is not only prohibited by the law, but made a crime.

The supreme court of Tennessee in a recent case held that—

"Legislation intended to affect a particular class, and not the public at large, must extend to and embrace equally all persons who are or may be in the like situation and circumstances; and the classification must be natural and reasonable; not arbitrary and capricious. Sutton *vs.* State, 33 L. R. A., 589; 96 Tenn., 696; 36 S. W., 697."

The Supreme Court of the United States in construing the 14th amendment to the Constitution of the United States has held that—

"The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th amendment of the Federal Constitution, but the classification must be based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. Gulf, C. & S. F. R. Co. *vs.* Ellis, 165 U. S., 150; 41 L. ed., —; 17 Sup. Ct. Rep., 255."

The supreme court of California recently held that—

"A statute prohibiting barbers to carry on business after 12 o'clock on Sunday or on legal holidays, and applying to no other class of labor, is unconstitutional as special, unjust and unreasonable, working an invasion of individual liberty, since it is based upon no distinction to justify singling out that class of laborers. *Ex parte* Jentsch, 32 L. R. A., 664; 112 Cal., 468; 44 Pac., 803."

The supreme court of Washington recently held that—

"A city ordinance making it unlawful for barbers to pursue their calling on Sunday, without applying to other kinds of employment, is unconstitutional as class legislation. Tacoma *v.* Krech, 34 L. R. A., 68; 16 Wash., 296; 46 Pac., 255."

The Supreme Court of the United States held recently that—

"A statute imposing the penalty of an attorney's fee upon railroad corporations in case of failure to pay certain debts, without applying to individuals or other corporations, denies to railroad companies the equal protection of the laws. Gulf, C. & S. F. R. Co. *v.* Ellis, 165 U. S., 150; 41 L. ed., —; 17 Sup. Ct. Rep., 255;" see also Jolliffe *vs.* Brown, 14 Wash., 155; 3 Am. & Eng. R. Cas. N. S., 254; 44 Pac., 149; see also Sweetland *vs.* A., Top. & S. F. R'y (Colo.), 22, 220; 43 Pac., 1006."

66 It is unreasonable to assume that the inhabitants of the Indian Territory who are citizens of the United States can be invested by Congress with privileges and immunities which are by the same act denied to citizens of the States of the Union who may come into the Indian Territory with their property to engage in the ordinary pursuits of life. An act of Congress which would grant privileges and immunities to residents of the Indian Territory, and at the same time deprive citizens of the States who might bring their property into the Territory of the same privileges and immunities would be unconstitutional and void. Congress cannot enact under the Constitution class legislation. Under our Constitution there must be, so far as legislation is concerned, guaranteed and secured "equal rights to all men, and exclusive privileges to none." Any act of Congress, or of any of the States, violating this great and fundamental principle of our Government is contrary to the provisions of the Constitution, and all courts, State and Federal, must, when confronted by such act, hold it to be void and of no effect whatever.

The act of Congress approved May 2, 1890, put in force in the Indian Territory certain statutes of the State of Arkansas, among which was chapter 20, entitled "Common & statute law of England." That act made the *the* common law of England, in so far as the same is applicable, and of a general nature, the rule of decision in the In-

dian Territory, except so far as altered or repealed by other acts in force therein.

The constitutional provision to which attention is called was not brought to the attention of this court when the case was tried before, nor was it brought to the attention of the court of appeals for the Indian Territory when that court passed upon the case at bar. Nor was it proved in the case, as it stood before the court of appeals, that the transaction was free from fraud, or that the mortgagor was a citizen of Texas. If these constitutional provisions, and facts which are now in the record in this case had been before the court of appeals for the Indian Territory when this case was decided in January last, there undoubtedly would have been a decision affirming the judgment of the court below in the first instance, and holding that the right of the mortgagee to the property in question was superior to that of the attaching creditors in this case. A new case, in effect, is presented, and a right invoked not heretofore suggested, which is secured to the mortgagee in this case by article 4, section 2, of the Constitution of the United States.

It is therefore my imperative duty, entertaining these views, to instruct the jury in this case to return a verdict for the interpleader, which is accordingly done.

67 And afterwards, to wit, on the 13th day of June, 1899, it being the seventh day of the regular June term, 1899, of the United States court of appeals in the Indian Territory, the following proceedings were had and made of record in said cause, to wit:

W. P. H. McFADDEN ET AL., Appellants,
vs.
EVANS-SNIDER-BUEL CO., Appellee.

This cause is this day submitted to the court upon the briefs filed herein, and the oral arguments of appellants and appellee.

And afterwards, to wit, on the 4th day of January, 1900, it being the third day of the regular January term, 1900, of the said United States court of appeals in the Indian Territory, the said court handed down its opinion in said cause, which is in the words and figures following, to wit:

In the United States Court of Appeals in the Indian Territory.

W. P. H. McFADDEN ET AL., Appellants,
vs.
JOHN R. BLOCKER ET AL., Appellees. } No. 250.

Appeal from the United States court for the northern district of the Indian Territory, Hon. Wm. M. Springer, judge, presiding.

Maxey, Clayton & Martin, and William T. Hutchings, for appellants; H. M. Pollard, Chas. B. Stuart, S. H. Cowan, S. S. Fears, and Matlock, Cowan & Burney, for the appellees.

Opinion.

CLAYTON, *Ch. J.:*

This case was before us and decided by this court at its last January term. We then reversed and remanded the case. The facts are fully stated in the opinion we then handed down. (See 48 S. W. Rep., 1043.) The case now, however, presents two different phases, one of law and the other of fact.

The new question of law raised is, that inasmuch as there was no provision in the recording acts of this jurisdiction whereby a mortgage executed by a non-resident mortgagor could be recorded, as could be done by a resident, and as the mortgagee, therefore was required to take possession of the mortgaged property to secure a lien as to third persons, whereas the holder of a mortgage executed by a resident mortgagee was not, the recording acts are, therefore,
68 unconstitutional as to the holders of such instruments. The new question of fact is that it is now shown by the proof adduced at the last trial that the attaching creditor had actual notice of the existence of the mortgage before suing out his attachment.

We will consider these two new questions in the order above stated.

The law of this jurisdiction as it stood at the time of the execution of these mortgages, and also at the time of the levying of the attachment on the mortgaged property and of the rendition of the judgment in that suit, was as follows:

"All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proven or acknowledged; and when so proved or acknowledged, shall be recorded—if for lands, in the county or counties in which the lands lie, and, if for personal property, in the (*in the*) county in which the mortgagor resides." (Section 4742, Mansf. Dig.)

"Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage." (Section 4743, Mansf. Dig.)

In this case the parties to the mortgage resided in Texas, the mortgaged property was in the Indian Territory, both at the time of

the execution of the mortgage and the levying of the attachment, and, therefore, the mortgagor, being a resident of Texas, there was no place provided by the statute where the mortgage could be recorded. The mortgaged property was left in the possession of the mortgagor. It is argued that this is such a discrimination between residents of the Indian Territory, and non-residents, as to render the statute unconstitutional, as being in violation of the first clause of section 2, art. IV, of the Constitution of the United States.

By act of Congress of May 2, 1890, certain statutes of the State of Arkansas were extended over this Territory, among them the one we are now considering. At that time the supreme court of Arkansas, in the case of Watson *v.* Lumber Co., 49 Ark., 83, passing on this very statute, had held that a mortgage executed by a non-resident of the State could not, by a recordation of the mortgage in Arkansas, create a lien as against strangers to the instrument, although they may have had actual notice of its existence; that as to mortgages executed by non-residents a lien could only be created as against strangers by the mortgagee taking possession of the mort-
69 gaged property. This statute has been the law of Arkansas for a long period of time, and its constitutionality has never been successfully assailed, and it came to us with an interpretation of the highest courts of the State from whence it came fastened upon it. It is conceded that if the statute is unconstitutional, the decision of the supreme court of Arkansas treating it as a constitutional one does not make it so, and in such a case that a decision would not be binding upon us in other cases. But the fact that for many years the learned bar and the courts of that State, and many others having similar statutes, have failed to discover its unconstitutionality, and have constantly and persistently enforced it, is *pursuasive*, at least, of its legality, and if it is so palpably unconstitutional as is now so earnestly claimed by learned counsel for appellees, how came it that at the last trial, when it was here before, that the contention was not made, or even hinted at, to us? If so plain and certain now, how is it that it had not long since suggested itself to their legal minds? Why has it lain dormant during the whole period of a long trial, both in the court below and here? The suggestion of this offspring of an afterthought probably had its origin in a somewhat inaccurate and loose expression found in the original opinion of this court in the case when it was said that the holders of such a mortgage "belonged to a prescribed class." Both in oral and written argument of counsel, as well as the opinion of the eminent jurist who tried this case below, which opinion is made an appendix to the transcript filed in this court, this expression is laid hold of and is made the foundation of the claim of the unconstitutionality of the statute. The writer of that opinion disclaims the credit, attempted to be forced upon him, of having discovered this constitutional defect.

The clause of the Constitution of the United States referred to reads as follows:

"The citizens of each State shall be entitled to all privileges and immunities of citizens of the different States." (Art. IV, sec. 2, U. S. Const.)

This was intended to secure to the citizens of every State, within every other, the privileges and immunities (whatever they might be) accorded in each to its own citizens. (Lemon *v.* The People, 20 N. Y., 627.) It is a limitation upon the powers of the States, and in nowise affects the powers of Congress over the unorganized Territories and Indian reservations. It is doubtless*ly* true that the citizens of all the States must be accorded equal privileges and immunities within those Territories and reservations, but it does
70 not necessarily follow that they are to have the same privileges and immunities as those residing here. There are no such limitations upon the power of Congress anywhere expressed in the Constitution. The inhabitants of a State have a dual citizenship, State and Federal. The article of the Constitution under consideration guaranteed to the "citizens of each State" all privileges and immunities of citizens in the several States. But this interstate citizenship is only granted to citizens of a State, and not to citizens of the United States. There is no citizenship of this Territory, and the only citizenship its inhabitants and residents have, or Congress can confer, is national. (Prentiss *ex.* Brenner, 11 Fed. Cases, 385; U. S. *v.* Cruikshank, 92 U. S., 542; Piquit *v.* Swann, 11 Fed. Cases, 134.)

It is plain, therefore, that unless a law deprive the inhabitants of a Territory of some property or vested right, or of personal liberty, without due process of law, that Congress has plenary power of legislation over them. And more especially is this true of this Territory, which is organized and compose- entirely of Indian reservations. Wharton Amer. Law, sec. 461; Suth. Stat. Const., sec. 23; Thompson *v.* Utah, 170 U. S., 349; Cole *v.* Cunningham, 133 U. S., 107.

It is unnecessary to point out that the right of a non-resident to have a place in which he may record a mortgage is not property, or a vested right, and to deprive him of such a privilege is not to deprive him of his property or personal liberty without due process of law, and if it be conceded that such a statute would be unconstitutional in one of the States, it is not so in this Territory.

But would such a statute as we are now considering be repugnant to this constitutional provision if it were enacted by the legislature of a State? As before stated, many of the States have such statutes, and they have always been upheld by their courts and in every instance where a change was desired, so that non-residents might be enabled to record in the county where the mortgaged property was located, it has been found necessary to resort to legislative enactment. Since this statute was, by act of Congress, extended over this Territory, Arkansas, from whence it came, has enacted a law, permitting mortgages executed by non-residents to be recorded in the county where the mortgaged property was situated, and recently the United States Congress, recognizing, inferentially, at least, its validity, has passed a similar act. (Approved Feb. 3, 1897.)

In the case of Watson *v.* Thompson Lumber Co., *supra*, the supreme

court of Arkansas, passing on this statute held it valid. The
71 statute of Michigan formerly was the same in this respect as ours. In the case of Montgomery *v.* Wight, 8 Mich., 148, the supreme court of that State, in holding the statute valid, say: "If a chattel mortgage of property here is made by a non-resident, our law contains no provision for filing it. In such a case a change of possession is, therefore, essential and cannot be dispensed with against creditors or purchasers." And the mortgage executed by a non-resident was held invalid as against a levy and sale made under an execution. In New Hampshire, the statute makes no provision for recording a mortgage executed by a non-resident mortgagor. In the case of Smith *v.* Moore, 11 N. H., 55, the supreme court say: "As between the parties the mortgage is good. * * * But by the statute of 1832, it was of no validity against the creditors of the mortgagor, unless possession was taken under it. By the provisions of that act, no mortgage or personal property subsequently made, is valid against any other person than the parties to it, unless possession of the property be delivered and retained by the mortgagee, or unless the mortgage be recorded in the office of the clerk of the town where the mortgagor resides at the time of its execution. The mortgage could not be made valid by any record of it, because the mortgagor did not reside in this State at the time, and the town clerk's office, provided for by the statute, is a record within this State, and not within another government. * * * To protect the property against creditors, where the mortgagor resides out of the State, the mortgagee must take and retain the possession." See also Granger *v.* Adams, 90 Ind., 87.

The text-writers are in accord with these decisions. Jones on Chattel Mortgages, 4 ed., section 261, says: "In case the mortgagor resides out of the State, under a statute which provides for the recording of a mortgage at the mortgagor's place of residence, and does not provide for recording it in the place where the mortgaged property is situated, there can be no effectual record of the mortgage, and therefore the only effectual mode of making the mortgage is for the mortgagee to take and hold actual possession of the property." Cobby, vol. 2, sec. 578, says: "When the mortgagor resides outside of the State, and the only provision for the recording of the mortgage is that it shall be recorded in the county or town of the residence of the mortgagor, the mortgagee must take and hold possession of the mortgaged property, as if there was no law for the mortgaging of chattels."

The registry acts were "enacted to modify the rules of the common law, which made every chattel mortgage of articles capable of manual delivery unaccompanied with change of possession of
72 the things mortgaged *prima facie* void as to creditors of, and *bona fide* purchasers from the mortgagor; to give security to mortgagees by making their mortgages unaccompanied with possession of the property valid when recorded, and by the same record to protect creditors and purchasers against secret trusts." Pyeatt *v.* Powell, 10 U. S. A., 206 (8th ct.). And the court of appeals for the

eighth circuit, in the same case, say: "The registry acts * * * are in the nature of a police regulation of a State."

It is argued that because the effect of this statute is to prohibit a non-resident from entering into a contract whereby he may place a mortgage upon his chattels, and at the same time hold possession of them, it is unconstitutional, as prohibiting the right to contract in relation to one's personal property. But, it must be remembered that when a contract is subversive of the public interest, or against public morals, or effect- the public welfare, the legislature may control the manner in which the contract shall be executed, and, to some extent at least in such cases, control the right to contract at all.

The right to contract is not unlimited; the conflicting interest of individuals make this impossible. Rights in conflict with each other cannot be unlimited. Duties to persons, to society, the public and the Government, are imposed on every individual. Every man, when he enters into society, undertakes to perform these duties; and necessarily surrenders some rights or privileges on account of his relations to others. His right to contract becomes subject to these duties; among which is the duty to so conduct himself and use his own property as not to unnecessarily injure another. He submits to such restraints and burdens as may conduce to the general comfort, health and prosperity of the State. To conserve and enforce these rights and duties, the Government can impose such restrictions upon his actions as may be appropriate for that purpose. This power inheres in every sovereignty, and is essential to the maintenance of public order and the preservation of mutual rights from the disturbing conflicts which would arise in the absence of any controlling regulating authority. Leep *v.* R'y Co., 58 Ark., 415; Budd *v.* State of New York, 143 N. S., 517.

And it is not necessary that the contract thus brought within the control of the legislature shall be a public one or relate to public matters in which the Government or the people collectively shall have property rights. It is sufficient if it relates to a matter in which the pubic are interested.

A contract for interest on borrowed money between two individuals is purely personal and private; and yet all will now
73 agree that the usury laws are constitutional; and yet by these laws a contract for a larger rate of interest than that prescribed by the statute renders such a contract void as to such excess of interest, or the whole interest, or as to the entire contract, according to the language of the statute.

In Budd *v.* State of New York, *supra*, the Supreme Court of the United States held that the legislature had the power to fix the maximum rate to be charged by the owner of a private elevator. it has frequently been held that the legislature can regulate or prohibit the sale or manufacture of oleomargarine, for the purpose of protecting the public against fraud. Powell *v.* Commonwealth, 127 U. S., 678; 114 Pa. St., 265; State *v.* Addington, 12 Mo. App., 214; 77 Mo., 110.

The same powers are exercised in the enactment of our statutes

of fraud, which renders certain contracts void unless in writing, although such contracts are private and personal. And one of the principal reasons, if not the controlling one, in the enactment of our registry laws, is to prevent secret trusts to be fraudulently used, not as against the parties to the instrument, but as against the people generally. It is a matter in which every one who buys and sells goods and chattels has an interest. And, therefore, the subject is within the constitutional powers of the legislature, and, although a matter of private contract, may be regulated by the legislature, even to declaring such contracts void, and although such legislation may be unwise and work hardships, "yet the courts cannot interfere without usurping powers committed to another department of the Government. The appeal must be to the legislature or to the ballot-box, not to the judiciary." Powell *v.* Pennsylvania, 127 U. S., 678. And it matters not whether the (leg-lation) be by virtue of the police powers of the State, or by virtue of powers in the nature of the police power. The reasoning in both cases would be the same.

In the above-cited case of Powell *v.* Pennsylvania, the Supreme Court of the United States say:

"Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute is or may be conducted in such a way or with such skill or secrecy as to baffle ordinary inspection, or whether it involves such dangers to the public health as to require for the protection of the people, the entire suppression of the business, rather than its regulation in such a manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine; and as it does not appear upon the face of the statute, or of
74 any fact of which the courts must take judicial cognizance, that it infringes rights secured by fundamental law, the legislative determination of those questions is conclusive on the courts. It is not a part of their function to conduct investigations of fact entering into questions of public policy, merely, and sustain or frustrate the legislative will, embodied in a statute, as they may happen to approve or disapprove its determination of such question. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the Government has in the employment of means to that end is very large." And to the same effect are: Plumby *v.* Mass., 155 U. S., 461; Maybe *v.* Kansas, 125 U. S. 623; Leesy *v.* Hardin, 135 U. S., 100.

Does it "appear on the face of this statute, or from facts of which the court must take judicial cognizance," that "it infringes on rights secured by the fundamental law"? The statute was intended to secure the people from frauds arising from secret trusts; and as this affected the interest of the people, the legislature had full and ample power to pass it; and this power reached the non-resident as well as the resident. But, if non-residents who execute this class of instruments in the State are not to be affected by the act, but are to be left in the same attitude in which they were before, then the

legislature has but half performed its duty, and the enforcement of the law depends upon the fact as to who executed the instrument. If the instrument should be executed by a resident, the people would be protected; if by a non-resident, not; and as to all such instruments executed by them the same evils would continue to exist.

But, it is said, the legislature could have granted full relief by requiring the mortgage executed by a non-resident to be recorded in the county in which the property was situated, instead of requiring the mortgagee to take possession of the property. And it is true the legislature could have done this. But if in its judgment it were deemed that the public interest would be best subserved by adopting the one course rather than the other, is not its judgment final? Can the courts control it in a matter of judgment as between two remedies? Certainly not. From the very circumstances of the case in this particular the legislature was powerless to place residents and non-residents upon the same footing; and no one will doubt but that if legislation were necessary at all, it were necessary in the one case as well as the other; that the evils resulting from the use of unrecorded mortgages with possession of the property in the hands of the mortgagor were as great and demanded a remedy to the full extent, when executed by a non-resident as well as
75 a resident. If, then, the legislature in its wisdom and exercising its best judgment, concluded that as to non-resident mortgagors who from the fact that they did not live in the State, could not record their mortgages in a county of their residence in the State, should be required to turn over the possession of the mortgaged property to the mortgagee, instead of requiring such mortgages to be recorded in the county where the property was situated, it had the power to do so. That is what the common law required to be done, and if not done, the mortgage as to third persons was *prima facie* fraudulent and void. The statute only makes conclusive that which was before *prima facie*. The right to execute a mortgage so as to create a lien as to third parties is not interfered with, except that the manner in which it shall be done is regulated by statute. The fact that the mode prescribed for the non-resident may be more inconvenient than that prescribed for the resident is not because the statute intends to make a discrimination, but because of the situation of the parties and because in the judgment of the law-making power, no other as effective way could be adopted for the protection of the public.

The next contention is, that inasmuch as it was conceded at the last trial below that the attaching creditor had actual notice of the existence of the mortgages, no record of them was necessary as to him; that as far as he was concerned, actual notice validated the mortgages. If it be true that the statutes of Arkansas, contained in Mansfield's Digest, as they had been construed by the supreme court of that State prior to the time they were extended over this jurisdiction, is binding upon us, then this contention cannot be maintained. For that State has held in many decisions and without an exception that an unrecorded mortgage, with possession of the mortgaged property in the mortgagor, created no lien as to third parties, whether

there was actual notice or not; and this was decided and authorities cited when the case was last before us.

In Cross *v.* Fomby, 54 Ark., 178, the supreme court of Arkansas say: "We have no hesitation in saying that, under the statute of this State, an order of attachment becomes a lien upon the property of the defendant, subject to seizure on execution for the debts of the defendant in the county from the time the order comes to the hands of the officers; and that by levy of the attachment and judgment sustaining the same, such inchoate lien is perfected, and takes precedence of the lien of a mortgage executed before the order of the attachment came to the hands of the officers, but not re-
76 corded till afterward. * * * Though good between the parties, until filed for record under the statute, the lien of the mortgage as to third parties has no existence, and is not binding upon them, though they have actual notice of it." In the case of Dodd *v.* Parker, 40 Ark., the same court say: "Our statute of mortgage is peculiar. It provides that every mortgage shall be a lien on the mortgaged property from the time it is filed for record and not before, which filing shall be notice to all persons of the existence of a mortgage. And it cannot be legally filed for record until it has been properly acknowledged. Hence, it has been uniformly held in this State that an unregistered mortgage, or one which has been improperly admitted to registration, constitutes no lien upon the mortgage property as against a stranger, notwithstanding he may have actual knowledge of its existence." In Jacoway *v.* Gault, 20 Ark., the court say: "A mortgage not acknowledged or proven and recorded, as required by statute, though good as between the parties to it, is not valid as against subsequent purchasers or encumbrancers of the mortgaged premises, though they have actual notice of the existence of the mortgage." In Watson *v.* Thompson Lumber Co., *supra*, a case identical with this in all its features, the supreme court of Arkansas say: "It has been repeatedly held by this court that a mortgage is good between the parties thereto, though not acknowledged and recorded, but constitutes no lien upon the mortgaged property as against strangers, unless it is acknowledged and recorded, even though they have actual notice of its existence." And then proceeds to decide the principal question in this case, that a non-resident can execute no mortgage without turning over the possession of the mortgaged property to the mortgagee, which will create a lien as against strangers to the instrument. See also Main *v.* Alexander, 9 Ark., 112; Hannah *v.* Carrington, 18 Ark., 105; Haskill *v.* Livin, 25 Ark., 158.

While it is true that there may be certain conditions existing whereby this court would not be bound by the previous adjudications of the supreme court of Arkansas upon a statute of that State extended by act of Congress over this Territory, yet this case presents no such conditions. It has been repeatedly decided by this court, as well as by the court of appeals for the eighth circuit, and the Supreme Court of the United States, that a statute of a State extended over another jurisdiction is to be enforced in the latter jurisdiction as interpreted by the highest court of the State from whence

it came. Sanger *v.* Flow, 1 C. C. A., 56; Stutsman Co. *v.* Wallace, 142 U. S., 295.

77 The act of Congress of May 2, 1890, extending these statutes over the Indian Territory, reads as follows:

"That certain general laws of the State of Arkansas, in force at the close of the session of the General Assembly of that State of eighteen hundred and eighty-three as published in eighteen hundred and eighty-four, in the volume known as Mansfield's Digest of the Statutes of Arkansas, etc., are hereby extended over and put in force in the Indian Territory."

It is the "general laws in force in the State of Arkansas" at that time which were extended. And the general laws of that State in force then were the statutes, not as they might be hereafter construed, but as they were then construed by the highest court of Arkansas. In other words the decided laws were the general laws of the State then in force, and it was the general laws then in force that were extended. And therefore the interpretation of the supreme court of Arkansas had prior to the extension of the statute over this Territory, to the effect that an unrecorded mortgage created no lien as to strangers to the instrument, although they may have had actual notice of its existence, is, as we have before said, the statutory law of this jurisdiction.

And if this were a new question, undecided by any court, from what we conceive to be a correct interpretation of the statute, we would be compelled to hold, as the supreme court of Arkansas held, and range ourselves with those States which hold that actual notice of the existence of an unrecorded mortgage creates no lien as to strangers. The language of the statute is: "Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed for record and not before." If not to become a lien until filed for record, if before that time, it is not to become a lien at all, how can actual notice of the existence of a mortgage not filed for record make it a lien on the property? Such a construction would be construing away the very language of the statute.

In the case of Main *v.* Alexander, *supra*, decided by the supreme court of Arkansas in 1848, it was contended that the language of the act forbade a lien even as between the parties to the mortgage, but that court very properly held that as the recording acts were intended to give notice to strangers of an existing lien as between the parties they could not have any effect as to them and the court then say:

"The rights of the parties to a mortgage, whether acknowledged and recorded or not, are precisely the same as they were before the passage of the act referred to, and the only real difference
78 consists in the fact that although actual notice may be shown, it will constitute no answer to the demands of strangers, and that nothing short of an actual filing for record will be recognized as such a notice as to effect his rights."

In this case, therefore, we are compelled to hold that the fact that the attaching creditor had actual notice of the existence of these un-

recorded mortgages put him in no different condition than if he had had no such notice, unless it can be shown that the mortgages may be considered as at common law.

It is conceded that inasmuch as our recording acts made no provision for recording a mortgage executed by a non-resident mortgagor, such mortgages are not affected by it, and as the legal effect of all mortgages executed prior to the enactment of the statute in this jurisdiction were determined by the rules of the common law, so should these mortgages be, and to sustain this contention, counsel rely on the case of Pyeatt *v.* Powell, 10 U. S. A. 200, (8th ct.). But in that case, the mortgage was executed, and an execution levied upon the mortgaged property before the act of Congress extending the recording acts over the Indian Territory was passed. At that time we were without any statute upon the subject. The mortgagor resided, and the mortgaged property was situated, in the Indian Territory. The court held that while the common law may not prevail in the Indian Territory, yet in the Federal courts, in the absence of statutes repealing or modifying it, the common law is the rule of decision and guide of action, and, therefore, as there was no statutory law here relating to mortgages, nothing requiring them to be recorded, or changing the rule of the common law, and the action having been brought in a Federal court, and it having been shown that the mortgage having been executed, and the possession of the property retained by the mortgagor in good faith, the court held that under these circumstances, the common-law rule must prevail, and formulated the rule as follows:

"The rule of the common law is that a mortgage of personal property, unaccompanied with possession, is *prima facie* void as to creditors of the mortgagor; yet the presumption of fraud arising from that circumstance may be rebutted by explanations showing the transaction to be fair and honest, and giving a reasonable account of the retention of possession."

But this rule, however, was applied in the case solely because the action was pending in a Federal court and there was no statute changing the common law as a rule of decision for that court.

But there has since been an act of Congress, extending
79 over this Territory, among many others, the recording statutes of the State of Arkansas, and thereby changing the rule of decision in this particular from the common law to the statutory law as it existed in Arkansas in 1883, and this law was in force here at the time the mortgages in this case were executed and the writ of attachment levied upon the property. By the act of Congress, the whole system relating to the recordation of mortgages and to their liens and to the effect of such recordation, in the State of Arkansas, as they had existed there for many years, was extended over the Indian Territory. The whole subject was embraced by the act, bringing it strictly within the rule, "*expressio unius est exclusio alterius.*" If the statute provided no place for recording a mortgage executed by a non-resident mortgagor, it intended it. If in the wisdom of the legislature it was thought best that in such case the mortgagee should be required to take possession of the mortgaged

property rather than to allow him to record it at the place where the mortgaged property should be situated, it had the power to do so; and the reason for such action as to personal property is apparent. Today the non-resident owner of chattels, a man who may be in today and out tomorrow, *may place a mortgage* upon them and record it in the county where situated; in a week hence he may have them in a county an hundred miles away, and, keeping secret the fact that he had executed a mortgage upon them and had it recorded in one of the counties through which he had passed, he may deal with them as his own, and convey or otherwise dispose of them as his own, and thus defeat the very object of the recording acts. The very difficulty of locating the place of record in such cases would render the statute almost a nullity. Certainly the legislature never intended that any mortgages executed in the State should be left subject to the same abuses and liable to the same fraudulent uses as they were before the act; if, however, the contention of learned counsel for appellee be correct, that all mortgages executed by non-residents of the State are to be considered and treated as at common law, then as to all of the evils intended to be corrected still exist, and non-resident mortgagors are given the advantage over residents to the extent that they may, by the use of such instruments, continue the creation of secret trusts and such other fraudulent acts as the statute intended to remedy; besides we would be placed in the remarkable condition of having two rules of decision for our courts, the statutory rule for residents, and the common-law rule for non-resident mortgagors. Before the passage of the statute, all mortgages in Arkansas were at the common law, and it was the evils attendant upon the use of the common-law mortgage
80 that the act intended to remedy, and it would be absurd to claim that the legislature intended to correct the evil when the mortgage should be executed by one class of people, and not when executed by another. In our opinion, it was intended by the act that in the execution of a mortgage by a non-resident mortgagor upon the property in the State, so as to create a lien as to third parties, actual delivery of possession to the mortgagee and retention of possession by him must be had, and if intended, it is the command of the legislature, and must become our statutory rule of decision. If this be not true, then all of the States which have been enforcing this statute in accordance with the view here expressed, are at fault, for the same objection made here would hold good as to any of the States having the same statute.

We therefore hold that the effect of the statute was to require all mortgages executed by non-residents of this Territory, before they could become liens as to third parties, to be accompanied by possession of the mortgaged property by the mortgagee, and that such legislation was constitutional. And we further hold that a mortgage not filed for record created no lien as to strangers, although they may have actual notice of its existence.

The judgment of the United States court for the northern district is therefore reversed, and at the request of counsel for all the parties made here in open court, judgment is here rendered for the appel-

lant, saving to the appellee all his rights of appeal to the United States circuit court of appeals for the eighth circuit.

Thomas, J.; Townsend, J.; Gill, J., concur.

Indorsed: Filed January 4th, 1900. Wm. P. Freeman, clerk.

Upon which said opinion the said court on the said 4th day of January, 1900, rendered and caused to be entered of record in said cause, the following judgment, to wit:

W. H. P. McFADDEN ET AL., Appellants,
vs.
JNO. R. BLOCKER ET AL., Defendants, with EVANS-SNIDER BUEL Co., Interpleaders, Appellees.

This cause came on to be heard this the 4th day of January, 1900, upon the transcript of the record of the United States court for the northern district of the Indian Territory held at Wagoner, and was argued by counsel; on consideration whereof it is the opinion of the court that there is error in the proceedings, record and judgment of said United States court for the northern district of the Indian
81 Territory in this cause, in this; the court erred in directing the jury to return a verdict in favor of the interpleaders, Evans-Snider-Buel Co.

It is therefore considered by the court that the judgment of said United States court for the northern district of the Indian Territory, sitting at Wagoner in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs; and all parties being present and represented by counsel, it is here in open court agreed that this court shall render judgment instead of remanding said cause for a new trial against the interpleader and its bondsmen for the amount of the judgment heretofore rendered in this cause against the defendant-, J. R. Blocker *et al.*, on the 29th day of January, 1897, together with the interest on the same to date, and all other costs in this behalf expended; it being understood that said agreement shall not affect the right of said interpleaders, or J. R. Blocker, to sue out or prosecute their writs of error from this court to any United States court having jurisdiction of this case.

And it being further shown in the evidence that the property levied on under the writ of attachment was taken by the interpleader and sold, it is therefore considered, ordered, and adjudged that the plaintiffs, W. P. H. McFadden, in his own right, and W. P. H. McFadden and Jas. A. McFadden, as executors of William McFadden, deceased, have and recover of and from the interpleader, Evans-Snider-Buel Co., and its sureties on the interpleader's bond: C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, the sum of $72,250.35, together with 6% interest thereon from this date, and all the costs incurred by the plaintiff in this court and in the court below in this action; and the clerk of this court is hereby authorized to issue exe-

cution for the amount of said debt and the costs of this court, together with the costs of this cause in the United States court for the northern district at Muskogee, Wagoner, and Tahlequah, and the clerk of the United States court for the northern district is hereby directed and ordered to send up a certified bill of the costs at each of the above-named places of holding court, and the same shall be included in said execution, to all which the appellees excepted in open court.

And afterwards, to wit, on the 13th day of January, 1900, the said appellee filed its petition for a writ of error, which is in the words and figures following, to wit:

82 In the United States Circuit Court of Appeals for the Eighth Circuit.

EVANS-SNIDER-BUEL COMPANY, C. W. TURNER, H. B. SPAULDING, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, Plaintiffs in Error,

vs.

W. P. H. MCFADDEN, in His Own Right, and W. P. H. MCFADDEN and James A. McFadden, Executors of William McFadden, Deceased, Defendants in Error.

Petition for Writ of Error.

To the honorable chief justice and judges of the United States court of appeals for the Indian Territory:

Your petitioners, Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, plaintiffs in error in the above cause, respectfully show that the above cause is now pending in the United States court of appeals for the Indian Territory, and that a judgment has been herein rendered (reversing and rendering a judgment in the United States court in the Indian Territory, in and for the northern judicial district) against Evans-Snider-Buel Company, and against C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, sureties, and that the matter in controversy in said suit exceeds one thousand ($1,000) dollars, besides costs, and that the jurisdiction of none of the other courts above mentioned is dependent in anywise upon the opposite parties to this suit or controversy, being aliens or citizens of the United States, or citizens of the different States; and that this case does not arise under the patent laws, nor revenue laws, nor criminal laws, and that it is not an admiralty case; and that it is a proper case to be reviewed by the United States court of appeals for the eighth circuit, upon writ of error.

And your petitioners would therefore respectfully pray that a writ of error be allowed in the above-entitled cause, directing the clerk of the United States court of appeals for the Indian Territory to send up the record and proceedings in said cause, with all things

concerning the same, to the (*the*) United States circuit court of appeals for the eighth circuit, in order that the errors complained of in the assignments of error, herewith filed by said plaintiffs
83 in error, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

EVANS-SNIDER-BUEL COMPANY,
C. W. TURNER,
H. B. SPAULDING,
HENRY M. POLLARD,
AMOS T. ATWATER,
MUNSON P. BUEL, AND
CHESTER A. SNIDER.
By H. M. POLLARD AND
STUART & GORDON,
Their Attorneys.

Allowed.
WM. H. H. CLAYTON,
Judge of the United States Court of Appeals for the Indian Territory.

Indorsed: No. 250. Petition for writ of error. Filed January 13th, 1900. Wm. P. Freeman, clerk.

And at the same time, to wit, on said 13th day of January, 1900, the said plaintiffs in error filed their assignments of error, which *is* in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, Plaintiffs in Error, *versus* W. P. H. McFadden, in His Own Right, and W. P. H. McFadden and James A. McFadden, Executors of William McFadden, Deceased, Defendants in Error.	No. 250.

Assignments of Error.

Now come Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, and say, that in the foregoing record and proceedings there is manifest error in the action, rulings, opinions, judgment and decree of the United States court of appeals for the Indian Territory in this, to wit:

I.

The United States court of appeals for the Indian Territory erred in holding that the act of Congress of the United States, in relation to mortgages in the Indian Territory, approved February 3rd, 1897, was not retrospective.

2.

The United States court of appeals for the Indian Territory erred in not holding that the act of Congress of the United States, approved February 3rd, 1897, validated all mortgages on per-
84 sonal property in the Indian Territory, which prior to said act had been executed and recorded in the judicial district in which the property was situated at the time, from the date of their original filing or recording.

3.

The United States court of appeals for the Indian Territory erred in holding that the right acquired by McFadden and others, by levy of their writ of attachment upon the property in controversy on the 17th day of June, 1896, and by the judgment of the court sustaining such attachment, was such a vested right as could not be taken away or impaired by an act of Congress of the United States.

4.

The United States court of appeals for the Indian Territory erred in holding that McFadden and others, by levying their writ of attachment upon the property in controversy, with actual notice of the mortgage upon the same, held and owned by plaintiffs in error, acquired rights superior to those of the mortgagee under said mortgage.

5.

The United States court of appeals for the Indian Territory erred in holding that sections 4742 and 4743 of Mansfield's Digest, chapter 110, in force in the Indian Territory prior to February 3rd, 1897, applied or had reference to non-resident mortgagors.

6.

The United States court of appeals for the Indian Territory erred in not holding that sections 4742 and 4743 of Mansfield's Digest, applied exclusively to resident mortgagors, and that where the mortgagor was a non-resident, the rights of his mortgagee as against attaching creditors, were to be determined, not by the recording acts, but by the common law in force in the Indian Territory.

7.

The United States court of appeals for the Indian Territory erred in not holding that sections 4742 and 4743 of Mansfield's Digest, were, in so far as the same applied to non-resident mortgagors, unconstitutional and void.

8.

The United States court of appeals for the Indian Territory erred in not confirming the judgment of the United States court for the northern district of the Indian Territory, in this cause rendered.

85 9.

The United States court of appeals for the Indian Territory erred in reversing and rendering the judgment of the United States court for the northern district of the Indian Territory.

Wherefore, and for divers other errors apparent on the face of the record, the Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, pray that said proceedings, as well as the judgment of the United States court of appeals for the Indian Territory, be reversed, and judgment rendered.

H. M. POLLARD &
STUART & GORDON,
Attorneys for Appellees.

Indorsed: No. 250. Assignments of error. Filed January 13th, 1900. Wm. P. Freeman, clerk.

And afterwards, to wit, on the 31st day of January, 1900, the said plaintiffs in error filed their supersedeas bond in said cause, which is in the words and figures following, to wit:

Know all men by these presents, that we, Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel and Chester A. Snider, as principals, and American Surety Company of New York, a corporation, organized and existing under the laws of the State of New York, as sureties, are held and firmly bound unto W. P. H. McFadden, in his own right, and W. P. H. McFadden and James A. McFadden, executors of William McFadden, deceased, in the full and just sum of one hundred thousand dollars, to be paid to the said W. P. H. McFadden, and W. P. H. McFadden and James A. McFadden, executors of William McFadden, deceased, their heirs, executors, administrators or assigns, of which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 29th day of January, in the year of our Lord one thousand nine hundred.

Whereas, lately at the January term of the United States court of appeals for the Indian Territory, in a suit depending in said court between W. P. H. McFadden, in his own right, and W. P. H. McFadden and James A. McFadden, executors of William McFadden, deceased, appellants, and Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel and Chester A. Snider, appellees, judgment was rendered against the said Evans-Snider-Buel Company, C. W.
86 Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, and the said Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel and Chester A. Snider, *have* obtained a wr't of error to the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said W. P. H.

McFadden, and W. P. H. McFadden and James A. McFadden, executors of William McFadden, deceased, citing and admonishing them to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after said citation. Now the condition of the above obligation is such that if the said Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel and Chester A. Snider shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void else to remain in full force and virtue.

[SEAL.] EVANS-SNIDER-BUEL CO.,
By M. P. BUEL, *President.*

A. T. ATWATER, *Sec.*

M. P. BUEL.
A. T. ATWATER.
HENRY M. POLLARD.
CHESTER A. SNIDER.
AMERICAN SURETY CO. OF NEW YORK,
By EBEN RICHARDS,
Resident Vice-President.

Attest:
[SEAL.] R. L. RINAMAN,
Resident Ass't Secretary.

Approved.
JOHN R. THOMAS,
Judge U. S. Courts and Associate Justice U. S. Court of Appeals for the Indian Territory.

STATE OF MISSOURI, } ss:
City of St. Louis, }

On this 29th day of January, 1900, before me came R. L. Rinaman, known to me to be the resident ass't secretary of the American Surety Company of New York, the corporation described in and which executed the annexed bond of Evans-Snider-Buel Co. *et al.*, as surety thereon, and who, being by me duly sworn, did say that he resides in the city of St. Louis, State of Missouri; and that he is the resident ass't secretary of the American Surety Company of New York, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of New York, and has complied with the provisions of the act of Congress
87 of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that said company has also complied with the provisions of the laws of the *State of* Indian Territory and — Missouri, relating to the business of surety companies in said State; that the seal affixed to the annexed bond of the Evans-Snider-Buel Co. *et. al.*, is the corporate seal of said American Surety Company of New York and was thereto affixed by order and

authority of the board of directors of said company, and that he signed his name thereto by like order and authority as resident ass't secretary of said company; that he is acquainted with Eben Richards, and knows him to be the resident vice-president of said company, and that the signature of the said Eben Richards subscribed to said bond is in the handwriting of the said Eben Richards, and was thereto subscribed by order and authority of the said board of directors; and that the assets of said company, unincumbered and liable to execution, exceeds its claims, debts and liabilities of every nature whatsoever, by the *the* sum of more than five hundred thousand dollars. R. L. RINAMAN.

Sworn to, acknowledged before me, and subscribed in my presence, this 29th day of Jan'y, 1900.

My commission expires May 5, 1902.

[SEAL.] H. G. CLEVELAND,
Notary Public for the City of St. Louis, State of Missouri.

Indorsed: No. 250. Supersedeas bond. Filed January 31st, 1900. Wm. P. Freeman, clerk.

UNITED STATES OF AMERICA, }
Indian Territory, } *ss.*

In the Court of Appeals.

I, William P. Freeman, clerk of the United States court of appeals in the Indian Territory, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings in the cause therein named, in said court, as the same remains on file and of record in my office. I further certify that the original writ of error and citation is returned herewith and made a part hereof.

Seal United States Court of Appeals in the Indian Territory.

In witness whereof, I have hereunto set my hand and affixed the seal of our said court at office in the city of South McAlester, Indian Territory, this 17th day of February, A. D. 1900.

WM. P. FREEMAN, *Clerk.*

(Cancelled 10c. U. S. int. rev. stamp.)

Filed Feb. 20, 1900.

JOHN D. JORDAN, *Clerk.*

88 (*Appearance for Plaintiffs in Error.*)

And on the twentieth day of February, A. D. 1900, an appearance of counsel for plaintiffs in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

EVANS-SNIDER-BUEL COMPANY ET AL., Plaintiffs in Error,
vs.
W. P. H. McFADDEN ET AL. } No. 1403.

The clerk will enter my appearance as counsel for the plaintiffs in error.

U. M. ROSE.
W. E. HEMINGWAY.
G. B. ROSE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1899. No. 1403. Evans-Snider-Buel Company *et al.*, plaintiffs in error, *vs.* W. P. H. McFadden *et al.* Appearance. Filed Feb. 20, 1900. John D. Jordan, clerk. U. M. Rose, W. E. Hemingway, G. B. Rose, counsel for plaintiffs in error.

(*Appearance for Plaintiffs in Error.*)

And on the twentieth day of February, A. D. 1900, an appearance of counsel for plaintiffs in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

EVANS-SNIDER-BUEL COMPANY ET AL., Plaintiffs in Error,
vs.
W. P. McFADDEN ET AL. } No. 1403.

The clerk will enter my appearance as counsel for the plaintiffs in error.

H. M. POLLARD.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1899. No. 1403. Evans-Snider-Buel Co. *et al.*,
89 plaintiffs in error, *vs.* W. P. McFadden *et al.* Appearance. Filed Feb. 20, 1900. John D. Jordan, clerk. H. M. Pollard, counsel for pl'ffs in error.

(*Appearance for Defendants in Error.*)

And on the fourteenth day of March, A. D. 1900, an appearance of counsel for defendants in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

EVANS-SNIDER-BUEL COMPANY ET AL., Plaintiffs in Error,
vs.
W. P. MCFADDEN ET AL. } No. 1403.

The clerk will enter my appearance as counsel for the defendants in error.

WILLIAM T. HUTCHINGS.
N. B. MAXEY.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1899. No. 1403. Evans-Snider-Buel Company *et al.*, plaintiffs in error, *vs.* W. P. McFadden *et al.* Appearance. Filed Mar. 14, 1900. John D. Jordan, clerk. William T. Hutchings, N. B. Maxey, counsel for defendants in error.

(*Order of Submission.*)

And on the fourth day of June, A. D. 1900, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1900.

EVANS-SNIDER-BUEL COMPANY ET AL., Plaintiffs in Error,
vs.
W. P. MCFADDEN ET AL. } No. 1403.

In error to the United States court of appeals in the Indian Territory.

MONDAY, *June* 4, 1900.

90 This cause having been called for hearing this day, it was, on application of counsel, ordered that the time for argument be extended one hour to each party, whereupon argument was commenced by Mr. U. M. Rose for plaintiffs in error, continued by Mr. W. T. Hutchings and Mr. N. B. Maxey for defendants in error, and concluded by Mr. H. M. Pollard and Mr. U. M. Rose for plaintiffs in error..

Thereupon this cause was submitted to the court on the transcript of record from said United States court of appeals and the briefs of counsel filed herein.

(*Opinion.*)

And on the nineteenth day of November, A. D. 1900, an opinion of said United States circuit court of appeals was filed in said cause in the words and figures following, to wit:

91 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1900.

EVANS-SNIDER-BUEL COMPANY ET AL., Plaintiffs in Error, *vs.* WILLIAM McFADDEN ET AL., Defendants in Error.	No. 1403. In Error to the United States Court of Appeals in the Indian Territory.

Mr. U. M. Rose and Mr. H. M. Pollard (Mr. C. B. Stuart, Mr. W. E. Hemingway and Mr. G. B. Rose were with them on the brief) for the plaintiffs in error.

Mr. W. T. Hutchings and Mr. N. B. Maxey (Mr. J. B. Clayton was with them on the brief) for the defendants in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

The record in this case discloses the following facts, in the light of which it is to be determined: On June 17, 1896, the Evans-Snider-Buel Company, the principal plaintiff in error, held two deeds of trust in the nature of mortgages, one dated April 23, 1896, and the other May 19, 1896, covering about six thousand seven hundred and seventy-five head of cattle, which deeds of trust had been executed by John R. Blocker, who was at the time a resident and citizen of Bexar county, State of Texas. The cattle described and covered by the two deeds of trust were at the time in pasture near the town of Muskogee, in the Creek Nation of the Indian Territory. The deeds of trust were given to secure the payment of notes executed by John R. Blocker to the amount of about $130,000, which were held at the time by the Evans-Snider-Buel Company and represented money that had been advanced by that company to Blocker to enable him to purchase the cattle in controversy. The testimony shows without any contradiction that Blocker had not advanced any money of his own to purchase the cattle but that they had been acquired with funds furnished for that purpose by the Evans-Snider-Buel Company. Both deeds of trust were filed for record and were recorded, within a day or two after their execution, in the clerk's office of the United States court for the northern district of the Indian Territory, that being the district in which the mortgaged
92 property was located. One of the mortgages, being the one that was first executed to secure notes to the amount of $122,184.60, was also recorded the day after it was executed in Bexar county, Texas, where the mortgagor resided.

On June 17, 1896, William McFadden and Son, the defendants in error, commenced a suit by attachment against John R. Blocker

in the United States court for the northern district of the Indian Territory upon a judgment in the sum of $55,875.71, which the attaching creditors had recovered against John R. Blocker in Jefferson county, Texas, on May 26, 1887. On June 29, 1896, they caused the writ of attachment in that suit to be levied on the cattle covered by the aforesaid deeds of trust, which were then in pasture near Muskogee in the Indian Territory. At the time of directing the levy of the writ of attachment McFadden and Son were aware of the existence of the two deeds of trust aforesaid, they having obtained a description of the cattle on which they directed the levy to be made by examining the description contained in said deeds of trust as then recorded in the Indian Territory.

On July 14, 1896, the Evans-Snider-Buel Company gave bond as interpleader in the cause, in the sum of $150,000, and having given such bond in accordance with law, was permitted to retain possession of the attached cattle. The writ issued in the attachment suit was returnable on the 3rd day of December, 1896, and at the return term of the writ, to wit, on January 27, 1897, the Evans-Snider-Buel Company filed its interplea in due form, asserting therein that the cattle were not subject to seizure and sale as the property of John R. Blocker, but were its property. Two days later, to wit, January 29, 1897, judgment by default in the sum of $55,875.71 was rendered against J. R. Blocker in the attachment suit, he having failed to make answer to the complaint.

Subsequently the issue arising on the interplea in the case as between the Evans-Snider-Buel Company and William McFadden and Son was twice tried and resulted on each occasion in a verdict in favor of the interpleader and against the attaching creditor, which judgments, however, were in each instance reversed on appeal by the United States court of appeals in the Indian Territory. The opinion of that court on the first appeal is reported in 48 S. W. Rep., 1043. On the last reversal the United States court of appeals in the Indian Territory rendered a judgment in favor of the attaching creditors and against the interpleader and the sureties on its bond in the sum of $72,250.35. The interpleader has brought the case to this court for review.

THAYER, circuit judge, after stating the case as above, delivered the opinion of the court:

Among the numerous chapters of Mansfield's Digest of the Laws of Arkansas which were extended over and put in force in the Indian Territory by the act of Congress of May 2, 1890 (26 Stats., 81, 95, c. 182), was chapter 110, entitled "Mortgages," which chapter contains among others the following sections:

"SECTION 4742. All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner that
93 deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded—if for lands, in the county or counties in which the lands lie, and, if for personal property, in the county in which the mortgagor resides.

"SECTION 4743. Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

Prior to the adoption of the chapter concerning mortgages as the law of the Indian Territory, it had been decided by the supreme court of Arkansas in Main *v.* Alexander, 9 Ark., 112, that by force of the aforesaid sections a mortgage on personal property executed in that State was good as between the parties thereto, though not acknowledged and recorded, but that it constitutes no lien upon the mortgaged property as against strangers until it is acknowledged and recorded in the mode prescribed by the statute although they have actual notice of its existence. The doctrine last stated had been recognized and enforced in the State of Arkansas in several other cases prior to May 2, 1890, but in some cases, notably in Martin *v.* Ogden, 41 Ark., 186, 192, and in Ford *v.* Burks, 37 Ark., 91, 94, it had been criticised as harsh and unjust and not in harmony with equitable principles as they prevail elsewhere. It had also been decided as early as 1886 in Watson *v.* Thompson Lumber Co., 49 Ark., 83, that a foreign corporation, not being a resident of that State, could not execute a mortgage on personal property located in that State which it owned, and by placing it of record create a lien which would be good as against strangers. In Main *v.* Alexander the controversy arose between a mortgagee whose mortgage was recorded but not properly acknowledged and a creditor of the mortgagor who had attached the mortgaged property subsequent to the execution and record of the mortgage, and it was decided that the lien of the attaching creditor was paramount. In the case of Watson *v.* Thompson Lumber Co., the controversy arose between a mortgagee who held a mortgage executed by a foreign corporation that was recorded in the county where the property was situated, and certain judgment creditors of the mortgagor company who had caused executions to be levied on the mortgaged property, subsequent to the execution and recording of the mortgage, and it was held that the lien of the judgment creditors was paramount to that of the mortgagee.

On February 3, 1897 (29 Stats., 510, c. 136), Congress passed an act to the following effect:

"That section forty-seven hundred and forty-two of Mansfield's Digest of the Laws of Arkansas, heretofore put in force in the Indian Territory, is hereby amended by adding to said section the following: 'Provided, that if the mortgagor is a non-resident of the Indian Territory the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated.'"

94 As this statute in express terms validated all mortgages theretofore made by non-residents of the Indian Territory on personal property there located which had been recorded in the

judicial district where the property was situated, and therefore embraced and validated the two mortgages that had been executed by J. R. Blocker in favor of the Evans-Snider-Buel Company—one of the principal questions discussed before this court concerns the power of Congress to enact the statute aforesaid and give to it such retrospective operation. It will be observed that William McFadden and Son, hereafter referred to as the attaching creditors, caused the writ of attachment in the action brought by them against J. R. Blocker, the mortgagor, to be levied on the cattle that were conveyed by the mortgage, about seven months before the act of Congress validating the mortgage was approved; also, that the judgment by default was entered in that case against the attached debtor five days before the law was enacted. But when the act was approved the interplea of the Evans-Snider-Buel Company in the attachment suit was still pending and undetermined as well as when the judgment by default was taken, and no trial of the issue existing between the interpleader and the attaching creditors was had until several months thereafter, to wit: on April 20, 1897.

We deem it wholly unnecessary to indulge in any extended discussion of the question which has been mooted, whether the act of Congress aforesaid impairs the obligation of a contract and is for that reason void, first, because the inhibition against the exercise of such power which is contained in section 10, article 1, of the Federal Constitution is not addressed to the national legislature, but to the legislatures of the several States; Mitchell *v.* Clark, 110 U. S., 633, 643; Legal Tender cases, 12 Wall., 457; Beach on Modern Law of Contracts, sec. 1633; and second, because no contract is disclosed by the record which the act of Congress in question operates to impair. It is true that the attaching creditors have a judgment against J. R. Blocker and that judgments are sometimes termed "contracts of record," but such general statements mean only that the law will imply a promise on the part of a judgment debtor to pay a judgment that has been recovered against him and that he may be sued in form *ex contractu* on such implied promise. A contract of that nature, however, which does not rest on the mutual assent of the parties thereto, but is forced upon the judgment debtor as the result of a legal implication—is not such a contract as the Federal Constitution was intended to protect against legislation tending to impair its obligation. This proposition is well established by controlling authority, State of Louisiana *ex rel.* Folsom *v.* Mayor of New Orleans, 109 U. S., 285, 288; Garrison *v.* City of New York, 21 Wall., 196, 203.

If the act of Congress of February 3, 1897, above quoted, is invalid, it is made so by virtue of the fifth amendment to the Federal Constitution, which, in so far as it is pertinent here, declares that "no person * * * shall be deprived of life, liberty or property without due process of law." This is a limitation on the power of Congress, and the question is, whether the attaching creditors will be deprived of a property right in the cattle which they have caused to be seized under the writ of attachment in their favor, if the act

given effect according to the manifest purpose of the law-maker.

It is urged in behalf of the attaching creditors that the lien obtained by virtue of the writ of attachment was of such nature that it could not be impaired by an act of Congress even if had been passed prior to the entry of the judgment by default gainst J. R. Blocker, the mortgagor, and certain authorities are ited in support of that contention, notably Day *v.* Madden, 9 Colo. pp., 464; Mulnix *et al. v.* Spratlin *et al.*, 10 Colo. App., 590; Hall *v.* tephens, 65 Mo., 670, 681; and Hannahs *v.* Felt, 15 Iowa, 141; but ree of these cases, the same being those that are first cited, were cided in States whose constitutions at the time declared that no * * * law retrospective in its operation * * * shall e passed," and in two of the cases the ruling to the effect that the en of an attachment cannot be divested by a legislative enactment t any time after the writ is levied, appear to have been based ainly on the theory that to give an act of the legislature the effect f impairing an existing attachment lien, would conflict with the ecal constitutional provision last quoted. The Iowa decision in Hannahs *v.* Felt, *supra*, does not appear to have been made under he influence of such a constitutional provision as has been adopted n Colorado and Missouri. In that case, however, the decision deny-ng the efficacy of a legislative act to discharge the lien of an attach-ment, was based principally on the ground that the act under con-deration did not in terms attempt to divest such liens, but that its eal purpose was to postpone for the time being sales of property be-onging to persons in the military service, either under a mortgage r deed of trust, or by virtue of an execution under a judgment or ecree. In so far, however, as that decision lends support to the aim that an attachment lien cannot be impaired at any time by gislative action, even where the legislature is not deprived of the ower to pass laws that are retrospective in their operation, it is not ly opposed to the decision of this court in National Bank of Com-erce *v.* Reithmann, 49 U. S. App., 144; 25 C. C. A., 101; 79 Fed. ep., 582, but to the decisions of other courts in cases where the estion has been expressly raised and decided. Freiberg *et al. v.* nger *et al.*, 90 Wis., 608; Stephenson *v.* Doe, 8 Blackford (Ind.) 8, 513. Considered as an original proposition the weight of ason, as well as the authorities on kindred questions, sustain the ew that an attachment lien, at least until a final judgment is ndered in the case, may be impaired, displaced or destroyed by gislative enactments which are designed to have that effect and at attaching creditors have no just ground to complain of such gislation. A writ of attachment is nothing more than a remedy forded by law for the collection of a debt. It is like a *capias respondendum* and a remedy of that nature may be abolished any time by the legislature which created it. The same prop-ition holds good with respect to all laws which merely provide medies for the enforcement of rights or the redress of grievances. ey may be modified or repealed without reference to the effect of ch legislation on pending actions, the only limitation on the power

of the legislature in this respect being that an adequate remedy must remain or be provided for the enforcement of such existing rights as have their origin in private contracts. In actions *ex contractu* litigants are not entitled to insist that they shall be afforded the same remedies or be privileged to plead all of the defenses that
96 were available when the contract was made or that have accrued subsequently under existing laws, the rule being that remedies, and those rights pertaining to the remedy which are purely of statutory creation, may be altered or abolished even after an action is instituted, provided an adequate remedy remains for rights founded on contract, and that some defenses such as those existing under usury laws and those that have accrued under statutes of limitation may be withdrawn and rendered of no avail. These principles are so familiar that a few cases only need be cited in their support. Terry *v.* Anderson, 95 U. S., 628, 633; Campbell *v.* Iron Silver Min. Co., 83 Fed. Rep., 643, 645; 55 U. S. App., 150; Wilson *v.* Simon, 45 Atl. Rep., 1022; Campbell *v.* Holt, 115 U. S., 620, 628; Ewell *v.* Daggs, 108 U. S., 143, 151; Morley *v.* Lake Shore R'y Co., 146 U. S., 162, 168; Van Hoffman *v.* City of Quincy, 4 Wall., 535, 553; Butler *v.* Palmer, 1 Hill (N. Y.), 324, 329, 330; Curtis *v.* Leavitt, 15 New York, 1, 152, 153; Sutherland on Statutory Construction, sec. 482. We are of opinion, therefore, that a legislative body like the Congress of the United States, which is not prohibited from passing retrospective or retroactive laws, has an undoubted power to divest or impair an attachment lien at least until there has been an adjudication that adequate grounds for the attachment exist and that the lien of the attachment be enforced. The power of Congress to deal with a remedy which it has provided for the collection of a debt does not cease as respects a suitor who has simply taken the initial steps to avail himself of the remedy but whose rights have not been finally adjudicated. The power in question continues, in any event, until such time as by making use of the remedy the suitor has acquired a title to or an interest in specific property which the parties to the action are no longer privileged to deny. It is only at such period that his rights can be said to have become vested. Prior thereto they are merely conditional or inchoate.

It is insisted, however, in behalf of the attaching creditors that they acquired a vested right or a vested interest in the cattle by the rendition of the judgment by default on January 29, 1897, which could not be impaired by a subsequent legislative enactment and that this proposition is tenable even if it be true, as last above held, that prior to that time the lien of the attachment might have been displaced by an act of Congress. With reference to this contention it may be said, that it is undoubtedly true that by the rendition of the judgment by default Blocker, the defendant in the attachment suit, lost his right to challenge the existence of the grounds of attachment on account of which the writ had been obtained, as well as the right to deny the fact of his indebtedness to the attaching creditors or the amount thereof. These were issues which the defendant in the attachment suit, and he alone, was entitled to raise. The Evans-Snider-Buel Company was not concerned therein and it is doubtful, to say

the least, if it was entitled to be heard with respect thereto, since its right to the cattle depended on other considerations. But, be this as it may, the judgment by default did not determine as against the party last named who had intervened in the attachment suit, as it had a right to do, and had denied the right of the attaching creditors to subject the attached property to the payment of their claims, that it could be so appropriated. That was an issue which remained to be
97 tried when the act of Congress of February 3, 1897, was approved, and it was in nowise affected by the judgment by default. It is difficult to understand, therefore, why the entry of that judgment changed the status of the case *eo instanti* as respects the interpleader and deprived Congress thenceforth of the power to enact a law which prior thereto it possessed the power to enact. The interpleader's rights were not adjudicated, since the judgment by default did not determine that the lien asserted by the attaching creditors upon the cattle in controversy was superior to the lien which was asserted by the interpleader. That question remained undecided and was left open for future consideration and decision. The phrase "a vested right" has no very precise signification. It is an expression which is not used in the Federal Constitution nor in any of its amendments, the language of the fifth amendment being that "no person * * * shall be deprived of * * * property without due process of law." In the law of real property, where it is most frequently employed, the word "vested" is used to define an estate either present or future, the title to which has become established in some person or persons and is no longer subject to any contingency. And when the phrase "a vested right" or a "vested interest" is used in other relations it may with reasonable precision be held to mean some right or interest in property that has become fixed or established and is no longer open to doubt or controversy. If the words in question are understood in that sense it cannot be said that the attaching creditors acquired a vested right to the cattle as against the interpleader, by the judgment in their favor against Blocker. Instead, however, of seeking for an exact definition of the phrase in question we think it will be more profitable for present purposes to refer to some of the cases, and particularly to those which are controlling authority here, where it has been held that rights acquired in virtue of existing laws and claimed to be vested, were not so far vested as to become property within the meaning of the Federal Constitution and to be for that reason beyond the reach of legislative action. Thus, in the case of Morley *v.* Lake Shore & Mich. So. R'y Co., 146 U. S., 162, a judgment had been obtained which under existing laws bore interest at a given rate. After its rendition the legislature reduced the rate of interest on judgments, doing so in language which made the act applicable to judgments that had been recovered before the act was passed. It was held that this law neither impaired the obligation of a contract nor deprived judgment creditors of their propety without due process of law. In Campbell *v.* Hoyt, 115 U. S., 620, 628, the right to plead the statute of limitations against a personal indebtedness had accrued in favor of the debtor, when the bar of the statute was re-

moved by the adoption of a new constitution. It was held that the debtor had no right to complain. The court said, "We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right so as to be beyond legislative power in a proper case." In Ewell *v.* Daggs, 108 U. S., 143, a right which had accrued to a debtor to plead usury as a defense under a law that was in force when the contract was entered into, was taken away by a subsequent enactment and it was held that no valid objection could be urged against such legislation. In Butler *v.* Palmer, 1 Hill (N. Y.), 324, it appeared that at the time of the sale of a judg-
98 ment debtor's land under an execution, the law allowed him a certain time to redeem and the master's deed specified this period of redemption on its face. A subsequent statute repealed the law granting such period for redemption and prescribed a shorter period within which the right must be exercised. It was held that the right to redeem within the period named in the master's deed was not so far vested that it could not be shortened by legislative action. See also The People *v.* Livingston, 6 Wend., 526.

In Green *v.* Abraham, 43 Ark., 420, a mortgage improperly acknowledged had been placed of record, which by reason of a defective acknowledgment was not notice to subsequent purchasers or lienors. Afterwards the mortgaged property was attached under a writ against the mortgagor, and thereafter the legislature validated the record of the mortgage. The mortgagee having brought replevin to recover the attached property from one who claimed it under the attachment, it was held, in substance, that the interest of the attaching creditor in the attached property was not vested but could be and that it was in fact displaced by the subsequent enactment validating the record of the mortgage. The following cases are similar to those already cited, and, as we think, uphold the same doctrine. Freeborn *v.* Smith, 2 Wall., 160, 175; Baker's Executors *v.* Kilgore, 145 U. S., 487; Terry *v.* Anderson, 95 U. S., 628, 633; Garrison *v.* City of New York, 21 Wall., 196, 205; Louisiana *v.* Mayor of New Orleans, 109 U. S., 285, 289; Baugher *et al. v.* Nelson, 9 Gill (Md.), 299, 309; Town of Danville *v.* Pace, 25 Grattan, 1, 15; Satterlee *v.* Matthewson, 16 Serg. & Raw., 169; Wilson *v.* Simon, 45 Atlantic Rep., 1022. It may be difficult in some cases to fix the precise date at which a right can be said to be fully vested and for that reason to have become property within the meaning of the Federal Constitution, when the right in question is purely of statutory creation, or has been acquired by pursuing some remedy which the law affords to suitors, and is in no sense an obligation arising out of contract; but we are of opinion that the right invoked in the case at bar was not vested on February 3, 1897, in any such sense as to be outside the sphere of legislative control. When called upon to resolve questions like the one in hand the courts have never deemed it necessary to close their eyes to the equities of the case but have frequently permitted their judgments to be influenced by the consideration that that which the legislature has done in the way of disturbing rights acquired under existing laws—was morally right and in accordance with justice and fair dealing. In an early case

(Foster *et al. v.* The Essex Bank, 16 Mass., 245, 273), Parker, C. J., remarked, "The truth is there is no such thing as a vested right to do wrong;" and this remark has been quoted with approval by the Supreme Court of the United States and other courts. Freeborn *v.* Smith, 2 Wall., 160, 175; Freeland *v.* Williams, 131 U. S., 405, 420; Goshorn *v.* Purcell, 11 Ohio St., 652; Town of Danville *v.* Pace, *supra*; Satterlee *v.* Matthewson, *supra*. And in Randall *v.* Kreiger, 23 Wall., 137, 149, the Supreme Court said, speaking with reference to a legislative act which impaired an existing title, "Claims contrary to justice and equity cannot be regarded as of that character (that is to say, as vested rights). Consent to remedy the wrong is to be presumed."

99 It is our privilege and duty, therefore, in determining whether a vested right has been violated and whether Congress exceeded its just power in validating the interpleader's mortgage, to consider whether its action was dictated by a sense of justice and was right when viewed from a purely moral standpoint. If it was, a more liberal view may well be taken of its power to displace the attaching creditor's lien than would be permissible if its action was partial or arbitrary and without just cause or excuse.

Viewing the case for the purpose last indicated, it is manifest at a glance that Congress was influenced by the highest considerations of public policy to pass the act of February 3, 1897, and that in so far as the interpleader and others in a like situation were concerned, it was justified in stretching its constitutional powers to their utmost limit to prevent the consummation of a grievous wrong. The cattle in controversy had been bought and paid for with the money of the interpleader with the understanding that they should be mortgaged to secure its repayment. Such a mortgage was executed. The transaction was fair and honest and all the publicity was given thereto which the circumstances permitted. We understand the local law to be that the mortgage so executed was in any event good as against the mortgagor, for such was the decision in Main *v.* Alexander, *supra*. The attaching creditors' debt was contracted long prior to the purchase of the cattle and the execution of the mortgage and they had actual knowledge of its execution and of the record thereof before they caused the writ of attachment to be levied. The attaching creditors seem to have made a deliberate attempt to appropriate the property of the interpleader to the payment of another's debt by taking advantage of a defect in the law, doing so in utter disregard of the doctrine which has been generally accepted by courts of equity since the decision in Le Neve *v.* Le Neve, 3 Atkinson, 646, 2 Leading Cases in Equity, 35, that one who purchases property with full knowledge of another's interest therein and with intent to deprive him of that interest is a purchaser *mala fide*. Under these circumstances it was the duty of Congress to afford all the relief against the threatened wrong which could be afforded by a liberal interpretation of its legislative powers; and it is likewise the duty of the courts, in such a case, to construe those powers liberally, to the end that a wrong may not be perpetrated through the forms of law. It may be that there is a legal presump-

tion that when Congress extended the chapter of the Arkansas statute concerning mortgages over the Indian Territory, it was aware of the interpretation that had been placed upon the various provisions of that chapter by the supreme court of that State; but a legislative body is not omniscient, and whatever may be the presumption, we are unable to believe that Congress possessed such knowledge in fact, and that it intended to deprive non-residents of the Territory of the power to make a mortgage on personal property there located which would be effectual to protect mortgagees against the claims of third parties. We can conceive of no reason which would be liable to influence Congress to enact a law of that character and are therefore constrained to believe that the peculiar construction placed on sections 4742 and 4743 of the mortgage act, by the supreme court of Arkansas, was unknown to Congress when they were made applicable to the Indian Territory, and
100 that it made haste to cure what it deemed an obvious defect or omission in the law as soon as its attention was directed to the defect. The act of February 3, 1897, stands on the same plane, therefore, as a curative act and should be treated as a statute which was enacted for the purpose of remedying a mistake theretofore inadvertently made by the lawmaker. When the attention of Congress was directed to the peculiar construction that had been placed on the aforesaid sections of the mortgage act in the State from which it was borrowed, it found the controversy between the attaching creditors and the interpleader still pending and undetermined. The rights of the former were *in fieri*. No court had at that time decided that they were entitled as against the interpleader to subject the mortgaged property to the payment of their judgment against the mortgagor, and believing, doubtless, that such an adjudication, if made, would defeat rather than promote the ends of justice, it undertook to forestall a possible decision of that nature by validating the record of the interpleader's mortgage. We are of opinion that the concluding clause of the act of Congress of February 3, 1897, which was designed to accomplish that end, was a lawful enactment and not in conflict with any provision of the Federal Constitution, because at the date of its enactment the attaching creditors had no such vested right or interest in the cattle in controversy as the constitution was intended to protect against legislative action.

Learned counsel for the interpleader have argued at some length that the United States courts in the Indian Territory were and are under no obligation to construe sections 4742 and 4743 of the chapter concerning mortgages as they were construed in Main *v.* Alexander, *supra*, because that decision is in conflict with other decisions of the supreme court of Arkansas on kindred questions and because it has been discredited by judicial criticism in the State of Arkansas and cannot be regarded as settling the true construction of the statute in controversy even in the State where it originated. They also claim that the attachment writ only operated upon such interest in the cattle as the mortgagor had at the time the writ was levied and that this interest was a mere equity of redemption, the mortgage

being in any event good as against the mortgagor. Some other propositions are also advanced, all of which have been noticed, but without expressing an opinion thereon, we prefer to rest our decision on the ground heretofore stated, that the act of Congress operated to validate the interpleader's mortgage.

The judgment of the United States court of appeals in the Indian Territory is accordingly reversed and annulled and the judgment of the United States court in the Indian Territory for the northern district thereof, which was rendered at its March term, 1899, being for the right party, is in all things affirmed.

SANBORN, *Circuit Judge*, dissenting:

The validity of the act of February 3, 1897, as construed by the majority of this court, in view of the basic principles of the social compact and of the 5th amendment to the Constitution, which declares that "no person shall be deprived of life, liberty or
101 property without due process of law" is best tested by a candid look at its legal effect upon the property of the parties to this action. It is conceded by the opinion of the majority and it was settled by the statutes then in force in the Indian Territory and by the uniform decisions of the supreme court of Arkansas interpreting those statutes from 1843 to 1891 (Main *v.* Alexander, 9 Ark., 112, 147; Hannah *v.* Carrington, 18 Ark., 85, 105; Jacoway *v.* Gault, 20 Ark., 190, 193; Haskell *v.* Sevier, 25 Ark., 152, 158; Ford *v.* Burks, 37 Ark., 91, 94; Dodd *v.* Parker, 40 Ark., 536, 540; Watson *v.* Lumber Co., 49 Ark., 83, 87; Cross *v.* Fombey, 54 Ark., 178, 184) that on the morning of February 3, 1897, the defendants in error had a first and specific lien impervious to the attacks of the mortgagee, the Evans-Snider-Buel Company, either at law or in equity, for the amount of the judgment which they had obtained in their attachment suit against Blocker, $55,875.71, upon the cattle that had been seized under the attachment, which were found to be worth $75,000. When that day closed, if the conclusion of the majority is right in this case, the Congress of the United States had by the act of February 3, 1897, divested the defendants in error of all beneficial interest in the cattle or in the lien which they held upon them and had granted to the Evans-Snider-Buel Company a first lien for $130,000 upon these cattle and had thereby deprived the defendants in error of all real interest in the stock. In other words, before the act of February 3, 1897, was approved, the defendants in error had a first lien upon the cattle which was worth $55,875.71, and the mortgagee had an inferior lien which was worth only the difference between the amount of this first lien and $75,000 or $19,124.29. The instant that act was approved the mortgagee had a first lien on the cattle for $130,000, which was worth $75,000 and the defendants in error had nothing. The act of Congress had the effect to transfer instantly property of the value of $55,875.71 from the defendants in error to the plaintiff in error, The Evans-Snider-Buel Company. It is not pretended that this was accomplished by any process of law, due or undue. It was done, if done at all, by

the arbitrary act of the Congress of the United States without notice, trial or hearing.

In my opinion an act of Congress or of a State legislature which has such an effect not only violates the fifth amendment of the Constitution, but is beyond the powers of the legislative department of of a republican government. Calder *v.* Bull, 3 Dallas, 383, 388; Tyrrell *v.* Rountree, 7 Pet., 463, 468; Gunn *v.* Barry, 15 Wall., 610, 622; Fletcher *v.* Peck, 6 Cranch, 87, 135; Tillotson *v.* Millard, 7 Minn., 419; Bougher *v.* Nelson, 9 Gill's Rep., 299, 307; Regents *v.* Williamson, 9 Gill & J., 365, 408; Merchants' Bank *v.* Ballou, 32 S. E. (Va.), 481, 483; Wade on Retroactive Laws, secs. 159, 191; Gilman *v.* Tucker, 28 N. E., 1046; Ratcliffe *v.* Anderson, 31 Gratt., 105; Murphy *v.* Garkins, 28 Gratt., 207, 222; Alter's Appeal, 67 Pa. St., 341; McCarty *v.* Hoffman, 23 Pa. St., 507; Greenough *v.* Greenough, 11 Pa. St., 489; Waples on Attachment (2nd ed.), 17, 736; 1 Shinn on Attachment, sec. 452, 322; Frellson *v.* Green, 19 Ark., 376; Bergman *v.* Sells, 39 Ark., 97, 101; Cole *v.* Cunningham, 133 U. S., 107, 116; Richardson *v.* Adler, 46 Ark., 49; Wade on Retroactive Laws, secs. 171, 173. In the discussion of the question at issue it must be borne in mind that it was not a mere judgment against the person or the right to enforce such a judgment or a mere general lien to secure it of which the defendants were here deprived. But it was a specific and absolute lien fixed by the judgment of the court upon personal property which had been reduced to the possession of the officer of that court and which was properly owned by the defendants in error and worth more than $55,000. In Calder *v.* Bull, 3 Dallas, 388, Mr. Justice Chase said: "There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the Government was established. * * * A law that punishes a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B; it is against all reason and justice, for a people to intrust a legislature with such powers; and therefore, it cannot be presumed that they have done it." In Tyrrell *v.* Rountree, 7 Pet., 466, after a judgment had been rendered in an attachment suit and a writ of *venditioni exponas* issued to sell land which had been attached the county was divided by a legislative act and the claim was made that this divested the lien upon the property in the new county, so that a sale thereof could not be made. Chief Justice Marshal said: "The counsel for the plaintiffs in error has argued the cause, as if the process under which the sale was made had been the usual execution awarded on a judgment rendered against a person brought into court by regular process. Without inquiring whether his objections to the charge would have been well founded, had that been the character of the case, it is sufficient to observe, that, in the actual cause,

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the land itself was attached. Not having been released, it remained in the custody of the officer, subject to the judgment of the court. An interest was vested in him, for the purposes of that judgment. The judgment did not create a general lien on it, but was a specific appropriation of the property itself to the satisfaction of that particular judgment. The process which issued did not direct the officer to levy it on the property of the defendants, but to sell that specific property which was already in his possession by virtue of the attachment, and was already condemned by the judgment of the competent tribunal. The subsequent division of the county could not divest this vested interest, nor deprive the officer of the power to finish a process which was rightly begun."

In Gunn *v.* Barry, 15 Wall., 610, 622, a case was presented in which a creditor had obtained a judgment against a defendant, which was a lien upon a large portion of his land, and before that judgment was enforced by execution sale the State of Georgia adopted a constitution which by its terms exempted from execution sale all the land of the defendant in the judgment. Mr. Justice Swayne in delivering the opinion of the Supreme Court said of this constitution: "The effect of the act in question, under the circumstances of this judgment, does not indeed merely impair, it annihilates
103 the remedy. There is none left. But the act reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is in effect taking one person's property and giving it to another without compensation. This is contrary to reason and justice and to the fundamental principles of the social compact." No further authority would seem to be required to establish the propositions that the specific lien upon the cattle which the defendants in error had perfected by their judgment against Blocker was a "vested right of property," and that its transfer from them to the mortgagee was "taking one person's property and giving it to another without compensation." If, however, other authority is desired it will be found in the decisions to which reference has been made above.

A careful perusal of the authorities referred to in the opinion of the majority discloses no decision of the Supreme Court and no persuasive opinion of any court which sustains the proposition that the legislative department of our Government may by an arbitrary act deprive one of a specific and perfected lien upon property which is worth more than $50,000 and vest it in another without compensation. The decisions of the Supreme Court cited by the majority, to the effect that interest on a judgment is a penalty for its non-payment and that from the time of the passage of a law it may be reduced by legislative enactment even upon judgments rendered before the act passed (Morley *v.* Lake Shore & Michigan Southern R'y Co., 146 U. S., 162), that the remedy for the enforcement of a personal judgment (which created no lien) against a municipality for damages resulting from mob violence may be lawfully taken away because the collection of such damages is a mere matter of public

policy, while the removal of the remedies for the collection of an ordinary judgment for tort by legislative act would be unconstitutional (Louisiana *v.* Mayor of New Orleans, 109 U. S., 285, 291), that the removal of the bar of the statute of limitations against a personal debt does not impair any contract of the debtor or deprive him of any property which he possessed, while the removal of the bar of such a statute against the assertion of a claim to either personal or real property is a violation of the 5th amendment to the Constitution and a taking of property without due process of law (Campbell *v.* Holt, 115 U. S., 620, 623, 628), that a debtor has no vested right to plead and recover the penalty prescribed by a statute for usury and that a law repealing such a statute may well apply to prior contracts (Ewell *v.* Daggs, 108 U. S., 143, 150) seem to me to have no tendency to show that the Supreme Court has ever sustained or intimated that it would permit the bold taking of $50,000 worth of private property from one person to give it to another without compensation. It would be unprofitable to review the cases cited from the State courts in the opinion of the majority because the decisions of the Supreme Court to which reference has been made are conclusive upon this question and render the consideration of other authorities unnecessary. It may, however, be remarked in passing that the decision in Butler *v.* Palmer, 1 Hill (N. Y.), 324, that after the
104 sale of a judgment debtor's land under execution a statute may be lawfully passed curtailing the period of redemption is by no means the settled law of the land and that the counter-proposition is well sustained by reason and authority. Willis *v.* Jelinek, 27 Minn., 18; O'Brien *v.* Kreuz, 36 Minn., 136; Heyward *v.* Judd, 4 Minn., 483; Hillebert *v.* Porter, 28 Minn., 496, and the cases there cited. Attention may also be called to the fact that the decision of the supreme court of Arkansas in Green *v.* Abraham, 42 Ark., 420, 425, is inapplicable to the questions presented in this case because it rests upon the proposition that the mere levy of an execution upon personal property under a personal judgment which creates no lien vests no right of property in the judgment debtor and therefore a curative act validating a mortgage upon the property seized did not constitute the taking of private property for private use. The decision rests upon the proposition that the levy of the execution vested no right of property. The later decisions of the court, however, conclusively hold that the entry of a judgment against the debtor in an attachment suit completes and perfects the lien of the attachment and vests a right of property in the judgment creditor. Richardson *v.* Adler, 46 Ark., 49; Frellson *v.* Green, 19 Ark., 376; Bergman *v.* Sells, 39 Ark., 97, 101.

The argument that this specific lien upon the cattle evidenced by the attachment and judgment might be stricken down by an arbitrary act of Congress because there are authorities which hold that the repeal of a statute allowing attachments subsequent to the levy of a writ and before judgment against the debtor lawfully destroys the inchoate lien of the attachment, is a *non sequitur*, is supported by no authority and is contrary to all the decisions upon the question which have come under my notice. The lien of an attachment is

inchoate and conditional upon the entry of a judgment against the debtor until that judgment is entered, but perfect, absolute and unassailable after such a judgment and a judgment sustaining the attachment have been rendered. There is respectable authority upon each side of the question whether or not a legislative act impairing or destroying the inchoate lien of an attachment before judgment destroys a vested right of property within the meaning of the 5th amendment to the Constitution. Hall *v.* Stevens, 65 Mo., 670, 681; Hannahs *v.* Felt, 15 Iowa, 141; Day *v.* Madden, 9 Col. App., 464; Mulnix *v.* Spratlin, 10 Col. App., 390. It is useless to consider or discuss that question here, for the lien of the defendants in error is not of that character. On January 29, 1897, three days before the act of February 3 was passed, they obtained a judgment against the defendant Blocker not only that the latter was indebted to them in the sum of $55,875.71, but also that their attachment of these cattle be sustained. The amount of the claim of the defendants in error had been adjudicated, their lien by attachment upon the cattle which were then in the custody of the court and their right to the sale of these cattle and to the application of their proceeds to the payment of their judgment had been adjudged to be perfect and absolute by a competent court having jurisdiction of their case three days before the act of February 3, 1897, was passed. The property of the defendants in error in the cattle was strictly analogous to, and as
105 great as the property of a mortgagee in mortgaged real estate after a decree of foreclosure of his mortgage and of sale of the land to satisfy his debt has been rendered against the mortgagor.

May the legislative department of the Government lawfully deprive such a mortgagor of his lien, his property, and transfer it to a stranger or to the holder of an inferior lien by its mere fiat? If not, then Congress could not lawfully deprive these defendants in error of their lien, their vested right, their property in these cattle, and transfer it to the Evans-Snider-Buel Company by the act of February 3, 1897. The lien which they acquired by their attachment and their judgment was impervious to attack, either at law or in equity. It was absolute, perfect, enforceable, assignable and salable. It was a complete and vested right. It was property worth $55,875.71 and was as completely vested in the defendants in error and as perfectly protected by the law of the land as acts of parties, laws and decisions can vest or protect any property. All the authorities are that while the lien of an attachment is inchoate and contingent until a judgment against the debtor is rendered, yet, after that judgment has been rendered the lien of the attachment is merged in the judgment which relates back to the date of the attachment and evidences a perfected and absolute right to apply the attached property to the payment of the judgment and that this is a vested right of property as sacred and as valuable as it is possible to secure under the laws of our land. Cole *v.* Cunningham, 133 U. S., 107, 116; National Bank of Commerce *v.* Reithmann, 79 Fed., 582, 583; 25 C. C. A., 101, 102; 49 U. S. App., 144, 146; Richardson *v.* Adler, 46 Ark., 43, 49; Waples on Attachment (2nd ed.), §§ 17, 736; 1 Shinn on Attachment, §§ 452, 322; Frellson *v.* Green, 19 Ark., 376; Bergman

v. Sells, 39 Ark., 97, 101: 1 Black on Judgments, 298; 1 Freeman on Judgments, § 90; Tillotson *v.* Millard, 7 Minn., 419; Lyon *v.* Sanford, 5 Conn., 545, 547, 549; Wade on Retroactive Laws, §§ 171, 173. In National Bank of Commerce *v.* Reithmann, 79 Fed., 582, 583; 25 C. C. A., 101, 102; 49 U. S. App., 144, 146, this court said: "An attachment is an ancillary remedy provided by statute, by means of which a contingent lien is obtained and impressed upon property of a defendant, which becomes vested and perfected on entry of judgment and levy of execution." In Richardson *v.* Adler, 46 Ark., 49, the supreme court of that State said: "The lien relates back to the levy of the attachment, creating from that moment an inchoate charge, which was perfected by the rendition of judgment and which could not be divested by any change in the status of the parties." Mr. Shinn in his work on attachment at section 572 declares that "a judgment sustaining the attachment and subjecting the property to execution perfects the lien created by the attachment, or rather it takes the place of such lien and relates back to the time of the levy; and takes priority over all subsequent attachments, liens or conveyances." Mr. Waples in his work on attachment at section 17 says: "By the law of relation an attachment judgment retroacts to the time the property was first attached; to the time it was first subjected to garnishment; so that no encumbrances put upon it by its owners since that time can have higher rank than the attaching creditor's lien. Such retroaction
106 makes the lien perfect from its first inception as though created by the contract of the parties; as though it were a mortgage lien voluntarily put upon the property by the defendant himself."

There is no conflict in the authorities upon this question. The principles which have been adverted to are indisputable and it follows from them inevitably that if a vested right or a vested interest in property is, as the majority are willing to concede, "some right or interest in property that has become fixed or established and is no longer open to doubt or controversy," then the defendants in error had such a right and interest in the cattle in the custody of the court on January 29, 1897, after their judgments against Blocker had been rendered and until the act of February 3, 1897, was approved.

The suggestion of the majority that the judgment against Blocker did not evidence a vested right in the cattle in the defendants in error as against the Evans-Snider-Buel Company does not seem to be founded in fact, because, while that judgment did not estop the company from claiming the cattle from the defendants in error and from litigating their claim, it did vest in the defendants in error an established lien and interest in the cattle superior to that of the Evans-Snider-Buel Company which was no longer open to doubt or controversy in the courts or under the law of the land. The Evans-Snider-Buel Company was unable to doubt or to controvert it by any proceeding at law or in equity. The only way which they found to open this vested right and interest to doubt or to contro-

versy was to secure this arbitrary act of Congress boldly taking it from the defendants in error and transferring it to this mortgagee.

If the suggestion of the majority was intended to be that this act of Congress does not violate the constitution because there was no adjudication of a court which estopped this mortgagee from claiming the property of these defendants and litigating its unfounded claim, that suggestion proves too much, because it would establish the proposition that Congress could lawfully take this property from the defendants in error and give it to any one of the inhabitants of the United States except Blocker and the still broader proposition that Congress may lawfully deprive any man of his property provided only that it does not transfer it to some party who has been estopped from litigating an unfounded claim against it by the judgment of some court. Judgments in favor of the owners and against all the world are not indispensable to the existence of vested rights of property and the fact that the defendants in error had no judgment against the Evans-Snider-Buel Company did not detract from the existence or the inviolability of their vested property in these cattle, since their right to them was established and was impervious to the attacks of the mortgagee under the law of the land.

Nor does the argument that this act of Congress which takes from the defendants in error a vested right of property worth more than $55,000 and gives it to the Evans-Snider-Buel Company should be held to be no violation of the prohibition of the constitution because "it was morally right and in accordance with justice and fair dealing" seem persuasive to me. The moral right or wrong of
107 an act of Congress which takes the property of A and transfers it to B is not in my opinion the true nor is it a safe test of the violation of the fifth amendment to the Constitution. A fatal objection to such a test is that the standard of moral right or wrong in the minds of men is variant. An act taking some of the property of a bad man and giving it to a good man, one taking part of the property of a rich man and giving it to a poor man, might be thought to be morally right and in accordance with justice and fair dealing by some, while it would be thought unjust and morally wrong by others. This very case illustrates the objection to this rule. To the majority of this court it seems to be morally right and in accordance with justice and fair dealing to take from these judgment creditors an established lien upon property which they had acquired in strict accord with the law of the land to secure a just debt and which was worth more than $55,000 and to transfer this right of property to a mortgagee which had taken mortgages that under that law were fraudulent and void as against these judgment creditors, while to the minority this act seems to have been morally wrong and subversive of the basic principles of a government established to protect the rights of person and of property. To me the fraudulent mortgagee seems to have no equitable or moral right to the cattle in question superior to that of the holder of the lawful lien. There was certainly nothing in the consideration or purpose of the loan made by the mortgagee to give it a superior equity over that of the judgment creditors. One has no higher right to the repayment of money

loaned to enable a debtor to purchase cattle than he has to the repayment of money loaned to enable him to buy horses or land or bread. The consideration and purpose of the debt of Blocker to the defendants in error does not appear in this record, but the presumption is that it was a valuable consideration and a worthy purpose, for the debt is evidenced by the judgment of a competent court of the State of Texas rendered in 1887. These defendants in error had waited for the payment of their debt more than ten years when they acquired their lien upon these cattle, while the Evans-Snider-Buel Company had made its loan within a year preceding that date. So far then as the consideration and purpose of these two debts are concerned those of the defendants in error must be deemed to be as meritorious as those of the mortgagee and as the defendants in error had waited more than ten years for their money while the mortgagee had not waited a year certainly it was not unjust or inequitable for them to secure the payment of their debt first. Nor is it perceived that there is anything in the character and the acquisition of the liens of these parties which gave to the mortgagee any higher right or superior equity to the payment of its debt over those which the judgment creditors held. The judgment creditors in violation of no law or public policy, but in strict accord with the statutes and the decisions of the courts interpreting them established by the judgment of a competent court a first and unassailable lien upon the cattle to secure their debt. The Evans-Snider-Buel Company took mortgages upon the cattle unaccompanied with any change of possession which were under the common law *prima facie* fraudulent and void as against the defendants in error (Pyatt *v.* Powell, 51 Fed., 551; 2 C. C. A., 371; 10 U. S. App., 200) and which under the statutes in the Indian Territory and under the uniform interpretation of them for 48 years by the courts of Arkansas which came to the Indian Territory as a part of those statutes, were conclusively fraudulent and void as against the defendants in error and as against all creditors of the mortgagor, although the latter had actual notice of their existence. Main *v.* Alexander, 9 Ark., 112, 117; Jacoway *v.* Gault, 20 Ark., 190, 193; Hannah *v.* Carrington, 18 Ark., 85, 105; Dodd *v.* Parker, 40 Ark., 540; Watson *v.* Lumber Co., 49 Ark., 83; Cross *v.* Fombey, 54 Ark., 179, 184. Now has a creditor who has procured mortgage liens from his debtor which are fraudulent and void as against other creditors a moral right to the mortgaged property so much higher than that of judgment creditors who have established a valid and superior lien upon it of the value of $55,000 in accordance with the law of the land that a court ought to sustain an arbitrary act of the legislative department of the Government which takes this $55,000 worth of property from the lawful lienholder without compensation and gives it to the fraudulent mortgagee in the teeth of the fifth amendment to the Constitution which declares that "no person shall be deprived of life, liberty or property without due process of law?" I think this question should be answered in the negative, and, whether or not this should be the answer, it seems to me that the constitutionality of an act of Congress which deprives men of their property without any process of law is not to be determined by a

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consideration of the moral right or wrong of the act or of the equities of those who lose and those who gain by the fiat. Constitutions and laws are enacted to declare and command the right and to forbid the wrong. Any theory that their violation may be permitted or excused or overlooked because in the varying opinions of any man or set of men that violation was morally right or in accordance with justice and fair dealing is subversive of the fundamental principles of government and ought not to be sustained. The adoption of such a theory would be in effect to add to the inhibition of the Constitution an exception which it does not contain, so that it would read: "No person shall be deprived of life, liberty or property without due process of law except in cases in which it is morally right and in accordance with justice and fair dealing to do so." When the people adopted the Constitution they determined that it was morally wrong to deprive any person of his property without due process of law under any circumstances. They engrafted no exception upon this prohibition and it is not the province of the courts to do so. The inhibition is clear, imperative and without exception. It prohibits the deprivation of any man of his property without due process of law. The act of February 3, 1897, as it has been construed by the majority of the court did in my opinion deprive the defendants in error of their property to the amount of more than $55,000 and was therefore to that extent unconstitutional and void.

For the reasons which have now been stated, perhaps too much at length, I am unable to concur in the opinion and conclusion of the majority in this case. I agree with the unanimous opinion of the court of appeals of the Indian Territory in which Judge Clayton has so logically, forcibly and to my mind convincingly presented the reasons why the act of February 3, 1897, had no effect upon the rights of the parties in this action and why the judgment lien of the
109 defendants in error was superior to the claims of the fraudulent mortgagee. McFadden *v.* Blocker, 48 S. W., 1043, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053.

The true construction of the act of Congress probably is as the court of appeals of the Indian Territory held, that it merely validated mortgages made by non-residents from the date of the passage of the act and had no retroactive effect. 48 S. W., 1048, 1053; Sutherland on Statutory Construction, § 463; Chew Heong *v.* United States, 112 U. S., 536, 539; Summer *v.* Mitchell, 10 South., 562. But if this is not the proper construction the act falls under the ban of the fifth amendment to the Constitution and is violative of the fundamental principles of republican government, and in either event it was ineffectual to take away the established lien of the defendants in error and to transfer their property to the mortgagee. For these reasons the judgment below should in my opinion be affirmed.

Filed November 19, 1900.

110 (*Judgment.*)

And on the nineteenth day of November, A. D. 1900, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1900.

EVANS-SNIDER-BUEL COMPANY, C. W. TURNER, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, Plaintiffs in Error, *vs.* W. P. McFADDEN in His Own Right and W. P. H. McFadden and James A. McFadden, Executors of William McFadden, Deceased.	No. 1403. In Error to the United States Court of Appeals in the Indian Territory.

MONDAY, *November* 19, 1900.

This cause came on to be heard on the transcript of the record from the United States court of appeals in the Indian Territory, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said United States court of appeals in the Indian Territory in this cause be, and the same is hereby, reversed and annulled with costs, and that Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider have and recover against W. P. McFadden in his own right and W. P. H. McFadden and James A. McFadden, executors of William McFadden, deceased, the sum of one hundred four and $\frac{70}{100}$ dollars for their costs in this behalf expended, and have execution therefor, except as to said executors.

It is further ordered and adjudged by this court that the judgment of the United States court for the northern district of the Indian Territory in this cause be, and the same is in all things hereby, affirmed, and that this cause be, and the same is hereby, remanded to the United States court for the northern district of the Indian Territory for proceedings therein according to law and justice.

November 19, 1900.

111 (*Petition for Writ of Error.*)

And on the thirtieth day of November, A. D. 1900, a petition for writ of error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

In the Supreme Court of the United States.

W. P. H. McFADDIN in His Own Right and W. P. H. McFaddin and James McFaddin, Executors of William McFaddin, Deceased, Plaintiffs in Error,

vs.

EVANS-SNIDER-BUEL CO., C. W. TURNER, H. B. SPAULDING, HENRY M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, Defendants in Error.

Petition for writ of error.

To the Honorable Chief Justice and Associate Justice- of the Supreme Court of the United States:

Your petitioner W. P. H. McFaddin in his own right and W. P. H. McFaddin and James A. McFaddin, executors of William McFaddin, deceased, plaintiffs in error in the above-entitled cause, respectfully show that the said above-entitled cause i*n* now pending in the United States circuit court of appeals for the eighth circuit, and a judgment has been therein rendered reversing the judgment in the United States court of appeals for the Indian Territory and affirming the judgment of the United States court in the Indian Territory in and for the northern district of the Indian Territory and having by consent of parties rendered judgment in said cause; that the matter in controversy in said suit exceeds $1,000.00, besides costs, and that the jurisdiction of none of the other courts above mentioned is dependent in anywise upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of the different States, and that this case
112 does not arise under the patent laws nor the revenue laws nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error.

And therefore your petitioners would respectfully pray that a writ of error be allowed them in the above-entitled cause, directing the clerk of the United States circuit court of appeals for the eighth circuit to send the record and proceedings in said cause, *will* all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by said plaintiffs in error may be reve*i*wed and, if error be found, corrected, according to the laws and customs of the United States.

W. P. H. McFADDIN
In His Own Right and
W. P. H. McFADDIN AND
JAMES A. McFADDIN,
Executors of William McFaddin, Deceased,
By their attorneys, WILLIAM T. HUTCHINGS,
NAPOLEON B. MAXEY.

(Endorsed:) Supreme Court of the United States. No. —. W. P. H. McFaddin, etc., *et al.*, plaintiffs in error, *vs.* Evans-Snider-Buel Co. *et al.* Petition for writ of error. Filed Nov. 30, 1900. John D. Jordan, clerk.

(*Assignment of Errors.*)

And on the thirtieth day of November, A. D. 1890, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

In the Supreme Court of the United States.

W. P. H. McFADDIN in His Own Right and W. P. H. McFADDIN and James A. McFaddin, Executors of William McFaddin, Deceased, Plaintiffs in Error,

vs.

EVANS-SNIDER-BUEL CO., C. W. TURNER, H. B. SPAULDING, HENRY M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, Defendants in Error.

113 *Assignment of Errors.*

Now comes W. P. H. McFaddin in his own right and W. P. H. McFaddin and James A. McFaddin, executors of William McFaddin, deceased, plaintiff- in error in the above-entitled cause, by their attorneys, and say that in the foregoing record and proceedings there is manifest error in the action and rulings of the United States court for the Indian Territory and then northern district thereof, as well as in the action, rulings, and opinions of the United States circuit court of appeals for the eighth circuit, in this, to wit: Said United States court in the Indian Territory, northern district, erred:

1.

In admitting in evidence the mortgages marked "Exhibits A, B, C, and D."

2.

In permitting the witness Atwater to testify as follows: "Q. Mr. Atwater, please state to the court and jury whether, if you know as a matter of fact, it was Blocker's money that bought these cattle for which these mortgages were executed or whether it was money of Evans Snider-Buel Co. Well, do you know whether the mortgagee in this case advanced the money or not that purchased these cattle? Who advanced the principal? A. Evans Snider-Buel Co. advanced the money. Q. Did the Evans-Snider Buel Co. advance all the money that went into these cattle? A. Yes, sir; all of it."

3.

In directing the jury to return a verdict for the interpleader.

4.

In overruling the motion for a new trial and in entering judgment on the verdict in this case against plaintiffs' objection.

And the said United States circuit court of appeals erred:

1.

In reversing the judgment of the United States court of appeals for the Indian Territory.

2.

In affirming the judgment of the United States court in the Indian Territory, northern district, because of each — several
114 errors of the latter court as to its action and rulings, as to each and every one of the errors above specified.

Wherefore, and for divers other errors appearing on the face of said record, W. P. H. McFaddin in his own right and W. P. H. McFaddin and James A. McFaddin, executors of William McFaddin, deceased, pray that said proceedings, as well as the said judgment of both the United States circuit court of appeals for the eighth circuit and the United States court in the Indian Territory, northern district, be reversed.

WILLIAM T. HUTCHINGS,
NAPOLEON B. MAXEY,
Attorneys for Plaintiffs in Error.

(Endorsed:) No. —. Supreme Court of the United States. W. P. H. McFaddin, etc., *et al.*, plaintiffs in error, *vs.* Evans-Snider-Buel Company *et al.* Assignment of errors. Filed Nov. 30, 1900. John D. Jordan, clerk.

(*Bond on Writ of Error.*)

And on the seventeenth day of December, A. D. 1900, a bond on writ of error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the 8th Circuit.

EVANS-SNIDER-BUEL CO., C. W. TURNER, H. B. SPAULDING, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, Plaintiffs in Error,

vs.

W. P. H. MCFADDIN in His Own Right and W. P. H. MCFADDIN and James A. McFaddin, Executors of William McFaddin, Deceased, Defendants in Error.

Know all men by these presents that we, W. P. H. McFaddin in his own right and W. P. H. McFaddin and James McFaddin, executors of William McFaddin, deceased, principals, and the United States Fidelity & Guaranty Co., sureties, are held and firmly
115 bound unto Evans-Snider-Buel Co., C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider in the full and just sum of $500.00, to

be paid to the said Evans-Snider-Buel Co., C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, their heirs, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the 28th day of November, in the year of our Lord one thousand nine hundred.

Whereas lately, in the November term of the United States circuit court of appeals for the 8th circuit, in this suit, depending in said court, between Evans-Snider-Buel Co., C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, plaintiffs in error, and W. P. H. McFaddin in his own right and W. P. H. McFaddin and James A. McFaddin, executors of William McFaddin, deceased, judgement was rendered against the defendants in error, reversing the judgement of the United States court of appeals for the Indian Territory and affirming the judgement of the United States court in the Indian Territory, in the northern district, and the said W. P. H. McFaddin in his own right and W. P. H. McFaddin and James A. McFaddin, executors of William McFaddin, have obtained a writ of error in the Supreme Court of the United States to reverse the judgement in aforesaid suit, and a citation directed to the said Evans Snider Buel Co., C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, citing and admonishing them to appear in the United States Supreme Court, at the city of Washington, District of Columbia, thirty days from and after the date of said citation:

Now, the conditions of the above obligation is such that if the said W. P. H. McFaddin in his own right and W. P. H. McFaddin and James McFaddin, executors of William McFaddin, deceased, shall prosecute said writ of error to effect and to answer the costs if they fail to make good their plea, then the above obligation to be void; otherwise to remain in full force and virtue.

116 W. P. H. McFADDIN,
By WM. T. HUTCHINGS, *Att'y.*
W. P. H. McFADDIN AND
JAMES A. McFADDIN,
Ex'ors of Wm. McFaddin, Dec'd.
By WILLIAM T. HUTCHINGS, *Att'y.*
[SEAL.] THE UNITED STATES FIDELITY & GUARANTY CO.,
By W. E. BOZEMAN,
General Agent, Muscogee, Ind. Ty.

Approved:
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

December 14, 1900.

Premium on bond, $5.00.

[Two-cent internal-revenue stamp, canceled.]
[One-cent internal-revenue stamp, canceled.]

(Endorsed:) No. 1403. Evans-Snider-Buel Co. *et al.*, plaintiffs in error, *vs.* W. P. H. McFaddin, etc., *et al.* Bond on writ of error. Filed Dec. 17, 1900. John D. Jordan, clerk.

(*Writ of Error.*)

And on the seventeenth day of December, A. D. 1900, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned.

117 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you or some of you, between Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, plaintiffs in error, and W. P. H. McFaddin in his own right and W. P. H. McFaddin and James A. McFaddin, executors of William McFaddin, deceased, defendants in error, a manifest error hath happened, to the great damage of the said defendants in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of December, in the year of our Lord one thousand nine hundred.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. —. Supreme Court of the United States. W. P. H. McFaddin, etc., *et al.*, plaintiffs in error, *vs.* Evans-Snider-Buel Co. *et al.* Writ of error. Filed Dec. 17, 1900. John D. Jordan, clerk.

Return to Writ.

United States Circuit Court of Appeals, Eighth Circuit.

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In testimony whereof I hereto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, Missouri, this 18th day of December, A. D. 1900.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

118 (*Citation.*)

And on the seventeenth day of December, A. D. 1900, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which, with acknowledgment of service thereon, is hereto attached and herewith returned.

119 UNITED STATES OF AMERICA, *ss:*

To Evans-Snider-Buel Company, C. W. Turner, H. B. Spaulding, Henry M. Pollard, Amos T. Atwater, Munson P. Buel, and Chester A. Snider, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein W. P. H. McFaddin in his own right and W. P. H. McFaddin and James A. McFaddin, executors of William McFaddin, deceased, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 14th day of December, in the year of our Lord one thousand nine hundred.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. —. Supreme Court of the United States. W. P. H. McFaddin, etc., *et al.*, plaintiffs in error, *vs.* Evans-Snider-Buel Co. *et al.* Citation. Filed Dec. 17, 1900. John D. Jordan, clerk.

Due legal and timely service of the within citation is hereby acknowledged in behalf of all and each of the defendants in error therein named this 17th day of December, A. D. 1900.

H. M. POLLARD,
Of Counsel for Defendants in Error.

120 (*Clerk's Certificate.*)

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing one hundred nineteen pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in a certain cause wherein Evans-Snider-Buel Company *et al.* were plaintiffs in error and W. P. McFadden *et al.* were defendants in error, No. 1403, May term, 1900, as full, true, and complete as the same remain on file and of record in my office.

I do further certify that the original writ of error and the original citation, with acknowledgment of service thereon, are hereto attached and herewith returned.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this eighteenth day of December, A. D. 1900.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No., 18,005. U. S. C. C. of appeals, 8th circuit. Term No., 520. W. P. H. McFaddin in his own right and W. P. H. McFaddin and James A. McFaddin, executors of William McFaddin, deceased, plaintiffs in error, *vs.* Evans-Snider-Buel Company, C. W. Turner, *et al.* Filed December 21, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

W. P. McFADDEN, PLAINTIFF IN ERROR, v. EVANS-SNYDER-BUEL COMPANY, DEFENDANT IN ERROR.	No. 520.

Motion to Advance.

Come now the plaintiff and defendant in error and move the Honorable Court to advance this cause upon the docket, and hear it at as early day as the convenience of the Court will permit; and for the reasons therefor, they state: The case involves a large sum of money, and there are a number of cases in the Indian Territory depending upon the decision in this case, and it is important to have the law of the case settled at the earliest moment; the case was submitted under Rule 20, upon printed briefs, but was resorted to the docket by the Court for oral argument. This case has been heard and decided by the United States Circuit Court of Appeals for the Eighth Circuit, and is one of the very few cases that can be taken from that court to the Supreme Court.

Respectfully submitted.

WILLIAM M. SPRINGER,

For Plaintiff and Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

W. P. McFADDEN,
PLAINTIFF IN ERROR,

v.

EVANS-SNYDER-BUEL COMPANY,
DEFENDANT IN ERROR.

No. 520.

Writ of Error to the United States Court of Appeals for the Eighth Circuit.

Stipulation to Advance.

Come the plaintiff and defendant in error, and beg leave to suggest to the Court that as this case has been submitted under the 20th Rule and was afterwards restored to the docket, subject to call, both parties request, if consistent with the business of the Court, that the case may be set down for oral argument at such day during the coming month of April as to the Court may seem proper.

Very respectfully,

WILLIAM T. HUTCHINGS,
N. B. MAXEY,
For Plaintiff in Error.
H. M. POLLARD,
U. M. ROSE,
For Defendant in Error.

Office Supreme Court U.S.
FILED
DEC 31 1900
JAMES H. McKENNEY,
Clerk

No. 520.

Brf. of Maxey & Hutchings for P. E.

SUPREME COURT OF THE UNITED STATES

Filed Dec. 31, 1900.

OCTOBER TERM, 1900.

W. P. H. McFADDEN, *et al.*,
Plaintiffs in Error,

VERSUS

EVANS-SNYDER-BUEL CO., *et al.*,
Defendants in Error.

No. 520

Brief on Behalf of Plaintiffs in Error.

NAPOLEON B. MAXEY,
WILLIAM T. HUTCHINGS,
Counsel for Plaintiffs in Error.

MUSKOGEE EVENING TIMES PRINT.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

W. P. H. McFADDEN, *et al.*,
Plaintiffs in Error,

VERSUS

EVANS-SNYDER-BUEL CO., *et al.*,
Defendants in Error.

No.

Brief on Behalf of Plaintiffs in Error.

STATEMENT.

This suit was instituted by the plaintiffs in error on the 17th day of June, 1896, and the attachment sued out therein was levied on 6775 head of cattle. Immediately thereafter, Evans-Snyder-Buel Company filed the interpleader's bond and affidavit and took possession of the cattle under *sections 390 and 301 of Mansfield's Digest* of the Laws of Arkansas, which are as follows:

"*Sec. 390.* When a sheriff shall levy a writ of attachment upon property claimed by a person not a party to the writ, such person may make oath to the property, and the same shall be delivered to him upon his giving bond in favor of the plaintiff, with security, to be approved by the sheriff, in a sum double the value of the property attached, which value

shall be ascertained by the oaths of two citizens of the county where the writ is levied, to be chosen by the sheriff."

"*Sec. 391.* Such bond shall be conditioned that the said claimant will interplead at the term of the court to which said writ shall be returnable; that he will prosecute such interpleader to judgment without delay, and if, on the trial of such interpleader, the said property shall be found to be the property of the defendant in such writ, and the plaintiff shall recover judgment against said defendant, the property shall be delivered to said sheriff or his successor in office whenever demanded by such sheriff, after execution upon such judgment comes to his hand to be levied thereon. In case the property so levied upon shall not be delivered as aforesaid, said bond shall have the force and effect of a judgment for the amount of the appraised value of such property and the costs of the interplea, if such appraised value be less than the amount of the judgment rendered in the original case, and, if more, for the amount of said judgment and costs, on which judgment execution against all the obligors may issue."

The interplea, however, required by the foregoing sections was not filed until January 27th, 1897. *(Record p. 2).* Two days thereafter a judgment was entered against the defendant in the suit, J. R. Blocker, for the sum of $55,875.71, at which time also was rendered a judgment sustaining the attachment. The interpleader claimed the cattle under certain mortgages given by said Blocker, who, as shown by the mortgages themselves, as well as the testimony in the case, was and is now a resident of Bexar county in the State of Texas, in which county some of the mortgages relied on had been duly executed and recorded. The cattle in question were situated in the Creek Nation, Indian Territory, and said mortgages were again recorded in the Northern District of the Indian Territory, at Muskogee and in the Creek Nation. The cattle were, at the time of the levy, in the possession of the mortgagor, J. R. Blocker. There have been several trials in this case, but at the last trial in the Northern District, where the plaintiff for the second time lost their suit, it was agreed *(Record, p. 48)* that in case the judgment should be reversed by the

United States Court of Appeals for the Indian Territory, judgment should be rendered against the interpleader by that court. The judgment was reversed and the United States Court of Appeals, pursuant to said agreement, on the 4th day of January 1900, *(Record, p. 80)*, entered judgment against the interpleader and its bondsmen for the sum of $72,250.35, from which judgment the interpleader prosecuted its writ of error to the United States Court of Appeals for the Eighth circuit. At the time the attachment in this suit was levied upon the cattle in controversy the following laws in relation to the registration of chattel mortgages were in force in the Indian Territory, being *Sections 4742 and 4743 of Mansfield's Digest.*

"*Sec. 4742.*' All mortgages, whether for real or personal, estate, shall be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded—if for lands, in the county or counties in which the lands lie, and, if for personal property, in the county in which the mortgagor resides.

"*Sec. 4743.* Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed (b) in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

As we have stated before, the attachment in this case was sustained on the 29th day of January, 1897. On February 3, 1897, three days thereafter, Congress amended the law above quoted by an enactment which reads as follows:

"*Sec. 4742 of Mansfield's Digest of the laws of Arkansas*, heretofore put in force in the Indian Territory, is hereby amended by adding to said section the following: Provided, that if the mortgagor is a non-resident of the Indian Territory the mortgage shall be recorded in the Judicial District in which the property is situated at the time the morgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the Judicial District thereof in which the prop-

erty was situated at the time they were executed are hereby validated."

U. S. Stats. at Large, 1896–7, p. 510.

The Circuit Court of Appeals reversed the judgment of the United States Court of Appeals for the Indian Territory and affirmed the judgment of the United States Court for the Indian Territory, Northern District.

ASSIGNMENT OF ERRORS.

The United States Court in the Indian Territory, Northern District, erred in

I.

Admitting in evidence the mortgages marked "exhibits A, B, C, and D."

II.

In permitting the witness Atwater to testify as follows:

"Q. Mr. Atwater please state to the court and jury whether if you know as a matter of fact it was Blocker's money that bought these cattle for which these mortgages were executed or whether it was money of Evans-Snider-Buel Co? Well, do you know whether the mortgagee in this case advanced the money or not that purchased these cattle? Who advances the principal? A. Evans-Snider-Buel Co. advanced the money. Q. Did the Evans-Snider-Buel Co. advance all the money that went into these cattle? A. Yes, sir; all of it."

III.

In directing the jury to return a verdict for the interpleaders.

IV.

In overruling the motion for a new trial and in entering judgment on the verdict in this case against plaintiff's objections.

And the said United States Circuit Court of Appeals for the Eighth Circuit erred,

I.

In reversing the judgment of the United States Court of Appeals for the Indian Territory.

II.

In affirming the judgment of the United States Court in the Indian Territory, Northern District because of each several errors of the latter court as to its action and rulings, as to each and every one of the errors above specified.

BRIEF OF ARGUMENT.

I.

Registry Laws Have No Extra Territorial Force.

The Court erred in admitting in evidence the chattel mortgages marked Exhibits "A," *(Record, p.)*, "B," *(Record, p.)*, "C," *(Record, p.)*, "D," *(Record, p.)*.

These deeds were made, executed and recorded in the States of Texas, when the cattle were located in the Indian Territory. To fix any lien on them in the Territory under such conditions, the laws in force in said Territory had to be fully complied with, for the cattle were not brought to the Territory fraudulently, but with the consent of the mortgagee. Therefore, comity will not protect any rights acquired under the Texas mortgage, if any indeed could have been acquired.

Pycatt vs. Powell, 2 C. C. A. 367, 51 Fed. 551.

Corbett vs. Littlefield, 11 L. Rep. Ann., 95.

Hall vs. Pillow, 31 Ark., 32.

Pope vs. Hanks, 40 N. E. 839.

When the deeds were recorded in the Indian Territory they were not a lien, as we had no law to record mortgages given by non-residents. The mortgages offered in evidence show on their face that the mortgagor was a resident of the State of Texas. The law was construed in Arkansas before it was adopted by Congress.

Watson vs. Thompson Lumber Co., 49 Ark., 83.

Jones on Chattel Mortgages, Section 248.

That construction binds this Court.

Sanger vs. Flow, 1 C. C. A., 56, 48 Fed., 152.

Appollos vs. Brady, 49 Fed., 401.

McClellan vs. Pyeatt, 50 Fed., 686.

Rainwater Hat Co. vs. Malcolm, 51 Fed., 734.

Hogg vs. Emerson, 6 How., 483.

Stutsman Co. vs. Wallace, 142 U. S., 295.

II.

The Law as Amended was Not Retroactive.

In order for the interpleader to recover it is necessary for it to convince the Court that the amendment quoted previously was not only retroactive, but that it was such a law as did away with the attachment lien of the plaintiffs.

(a) The terms are not necessarily retroactive.

We must construe all the amendment together. It was not a curative act solely. It did not purport to be enacted for the purpose of curing mistakes made in an endeavor to comply with an existing law. It first enacts a new law, whereby mortgages given by non-residents could be recorded so as to fix a lien, which would be notice of its existence to all the world. It went further and provided for the validation of such mortgages theretofore put on record. Under what law did they become valid? Certainly under the law just then enacted, and whose life could not extend back one day. It is not at all like a law which purports to cure defects for non-compliance with a law which existed and authorized the act at the time it was done, but which was not fully complied with.

February 3, 1897, was the first time the mortgage of a non-resident could have legally been put on record, and from

that moment only could life be put into those lifeless ones hitherto written on the books of record.

Newgass vs. Atlantic & D. Ry. Co., 56 Fed., 676.

The main law is clearly prospective in terms, and the validating clause following it must be similarly construed. It ratified what was void and cured the defect from the date of ratification.

Black on Interpretation of Laws, p. 253.

One of the many briefs written in behalf of the plaintiffs in error has found much food for reflection as well as occasion for argument in the fact that the amendment of *Sec. 4742* validates mortgages "heretofore" executed and recorded in the Judicial District, etc. In *Summer vs. Mitchell, 10 So. Rep., 562*, the Court was considering an Act in which the word "heretofore" occurred and which tended much more strongly to give the Act retroactive force than the use of it in the law under consideration. The Act was as follows: "That any deed of conveyance heretofore executed and acknowledged in compliance with the previous provision of the Act shall have the same force and effect and be as valid as if the same had been executed after its passage." The Court, although strongly urged to do so, refused to say more than that the effect of the Act was to validate at least from its approval any prior acknowledgement made out of the State of a deed conveying land located in the State.

Wade on Retroactive Laws, Secs. 255 and 266.

McCracken vs. San Francisco, 16 Cal., 591.

(b) *Both new statutes and amendments must be construed prospectively unless the language is imperatively to the contrary.*

Merchant's Bank vs. Ballou, 32 S. E., 482.

Black's Constitutional Prohibitions, Sec. 179.

Wade on Retroactive Laws, Secs. 34-39.

3 American and English Enc. of Law, p. 758, note. (New Ed.)

7 American and English Enc. of Law, pp. 681, 758, 761.

Peck vs. Jenness, 7 How., 845.

Rogers vs. Lynch, 29 S. E., 507.

Chew Heong vs. U. S., 112 U. S., 536.

Dugger vs. Mechanics and Traders Ins. Co., 32 S. W. Rep., 5.

Parson vs. Pain, 26 Ark., 124.

Fayette Building and Loan Ass'n vs. Bowles, 39 S. W., 1046.

Boylon vs. Kelley, 36 N. J. Eq., 331.

Goshen vs. Stonington, 10 Amer. Dec., 121.

Gaston vs. Merriam, 33 Minn. 278; 22 N. W., 614.

Bernier vs. Becker, 73 Ohio St., 72.

III.

Power of Congress to Pass Retroactive Laws.

Congress has power to pass such laws for many purposes, while on the other hand it is restricted in passing them in other instances.

For the purpose of this case it is sufficient to maintain that it cannot pass such laws which have the effect of divesting vested rights. This inhibition was imposed by the Fifth Amendment to the Constitution, which declared that no person should be deprived of his property without due process of law.

The Fourth and Fifth Amendments are limitations upon Federal, and not upon State, power.

Weimer vs. Bermberry, 30 Mich., 201.

Wade on Retroactive Laws, Secs. 156, 157, 264.

Steamship Co. vs. Joliffe, 2 Wall, 450.

Fletcher vs. Peck, 6 Cranch, 87.

Memphis vs. U. S., 7 Otto, 293.

7 Lawson's Rights and Remedies, Sec. 3850.

Black on Const.—Prohibitions, Secs. 176, 183, 207.

Sutherland on Statutory Construction, Sec. 480.

3 Amer. and Eng. Enc. of Law, pp. 759-760.

The Society, etc., vs. New Haven, 8 Wheat, 493.

Wilkinson vs. Leland, 2 Peters, 657.

Ferguson vs. Williams, 13 N. W. Rep., 49.

"If the language used required such a construction, it could not be effective to deprive a party of prior vested rights acquired under the levy."

Williamson vs. N. J. S. Ry. Co., 29 N. J. Eq., 335.

The cases of *Watson vs. Mercer, 8 Pet., 88*, and *Satterlee vs. Matthewson, 2 Pet., 380*, are relied on in the briefs of counsel for the interpleader. These cases arose under State laws, and at the time they were decided there was no clause in the Constitution of the United States prohibiting the State from passing laws that had no other effect than to divest vested rights. No such decision would now be rendered since the Fourteenth Amendment to the Constitution. Nor would any such have been made had the act under consideration in those cases been passed by Congress, for Congress was forbidden as we have shown above, from passing laws divesting vested rights. In other words there was nothing in the act involved in these cases in violation of the Constitution of the United States as it then stood, and that was the only error the Court could pass on. These decisions are merely to the

effect that a *State* Statute at that time, otherwise not amenable to constitutional objection, was not against the Federal Constitution upon the sole ground that it divested or destroyed vested right.

We have endeavored to show that as the Constitution of the United States now stands the United States and the States stand under it upon the same footing so far as the power to pass legislation injurious to vested rights is concerned. In 1893, the Legislature of Virginia, curing certain defects in acknowledgements, provided that "the record of any such deed of writing heretofore made shall, in all respects be deemed valid." The Court, after stating that no statute will be given a retroactive operation unless there is something on the face of the enactment, putting beyond a doubt that such was the purpose of the Legslature, proceeded to consider the power of the Legislature to enact any laws affecting liens acquired before the passage of the Act, and in passing upon that question makes this statement: "There can be no doubt that a judgment is such a vested right of property that the Legislature cannot, by a retroactive law, either destroy or dimish its value." It was contended in that case, also as is contended in this, that such a law merely affected or modified the remedy for the enforcement of the judgment, but the Court took a different view of the law and stated that no such specious reasoning could avail to destroy by a retroactive law a lien which alone gave the judgment its life and value.

Merchants Bank vs. Ballou, 32 S. E. Rep., p. 481.

Randall vs. Kreiger, 23 Wall., 137.

Wade on Retroactive Laws, Secs. 159, 191, 261.

A somewhat similar case, though one which originated in the Federal Court, decided that state legislation "may sanction past transactions, where vested rights are not disturbed."

Leland vs. Wilkinson, 35 U. S., 294; L. Ed. 430.

What then is a vested right?

Says the Supreme Court of the United States in *Steamship Co. vs. Joliffe, supra:*

"When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does no affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

Wade in Sec. 157, p. 190 of his work on *Retroactive Laws* says:

"Any right or thing which may be owned, bought, sold or assigned may be considered as a *vested* right, in the sense that the owner cannot be deprived of it otherwise than by 'due process of law' or 'the law of the land.' Unless something answering the description of *due process of law* is required by a retrospective statute which authorizes the transfer of a private right from one person to another, this provision of the Constitution is clearly violated, whether the right arose in contract or not."

It is thus defined by *Mr. Black, in Sec. 154* of his work on *Constitutional Law:*

"Vested rights are rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or cancelled by the act of another private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of proceedure and for the public welfare. A vested right, as distinguished from an interest in expectancy or a contingent interest, is a right of action or property immediately fixed in some particular person or persons."

See also:

Fletcher vs. Peck, 6 Cranch, 87, L. Ed. 162 notes.

Goshen vs. Stonington, 10 Amer. Dec., 134.

Lowe vs. Harris, 17 S. E., 539.

Grove vs. Todd, 20 Amer. Reps., 79.

3 Amer. and Eng. Enc. of Law, 758.

IV.

An Attachment Lien Perfected By Judgment is a Vested Right.

The attachment levied in this case was sustained and perfected on the 29th day of January, 1897, five days before the passage of the Act of Congress relied on to defeat the lien. The only question to consider then in determining our rights is, did we then have a vested right, and from what time did the right date.

The attachment was issued on the 17th day of June, 1896, and was levied on the property in question June 29, 1896, (*Record, p. 38.*)

"A judgment sustaining the attachment and subjecting the property to execution perfects the lien created by the attachment, or rather it takes the place of such lien and relates back to the time of the levy, and takes priority over all subsequent attachments, liens or conveyances."

1 Shinn on Attach., Sec. 452.

Waples on Attach., 2d Ed., Sec. 17.

Frellson vs. Green, 19 Ark., 376.

Bergman vs. Sells, 39 Ark., 97.

Cole vs. Cunningham, 133 U. S., 107.

"The attaching creditor has a vested right which the debtor cannot impair. The inchoate lien created by attaching becomes perfected by judgment which relates back to the seizure so as to make the lien a perfect one from the beginning."

Waples on Attach., 2d Ed., Sec. 736.

The same author, in his first edition, on *pages 580 and 581*, says:

"If matured by judgment, the lien becomes perfect; rather, it now has the character of a perfect lien from the date of its contingent creation. * * * By the law of relation an attachment judgment retroacts to the time the property was first attached. * * * Such retroaction makes the lien perfect from its first inception as though created by the contract of the parties, as though it were a mortgage lien voluntarily put upon the property by the defendant himself."

The authorities all agree that the lien of an attachment stands on as high ground as the lien of a properly levied execution, or any incumbrance that can be given by the voluntary act of the parties; and no intervening legislation can interfere with or destroy it. A court of respectable authority has, with great weight of reason, decided that an attachment lien, even before judgment, cannot be affected by a subsequent repeal of the law.

Mulnix vs. Spratler, 50 Pac. 1078.

Madden vs. Day, 48 Pac. Rep., 1053.

Willis vs. Croker, 1 Pick., 204; 18 Mass., 204.

Griggs vs. Banks, 59 Ala., 311.

Such might, too, be inferred from the language used in *Harrison vs. Trader, 29 Ark., p. 92:*

"But in attachment liens, the right grows from and inheres in the law, and the act of plaintiff in bringing suit properly, and the clerk in issuing the writ, and the sheriff in levying it on defendant's property as the law directs. These acts being performed, the lien, though inchoate, is perfect and substantial; as much so as the lien of a mortgage when properly executed, acknowledged and recorded; as much as a mechanic's lien, when the work is done, and the lien proven and filed in the clerk's office, as the law directs; as perfect as a vendor's lien, where his purchase money is unpaid for real estate."

But this Court while saying that "such lien is a substan-

tial and valuable security," maintains that the only way to preserve the lien upon a repeal of the statute would be by a saving clause, excepting pending attachments from the effect of the repealing clause. But it cannot be inferred from this that anything short of a repeal of the law, a dissolution by judgment or voluntary act of the parties could destroy or impair the lien acquired by the levy.

National Bank of Com. vs. Riethmann et al., 79 Fed. Rep., 582.

The opinion, then, announces the doctrine for which we are contending, as follows:

"An attachment is an ancillary remedy provided by statute, by means of which a contingent lien is obtained and impressed upon property of a defendant, which becomes vested and perfected on entry of judgment and levy of execution."

The Supreme Court of Arkansas puts it even more strongly when construing our own statute:

"The lien relates back to the levy of the attachment, creating from that moment an inchoate charge, which was perfected by the rendition of judgment, and which could not be divested by any change in the status of the parties."

Richardson vs. Adler, 46 Ark., 49.

Wade on Retroactive Laws, Secs. 171, 173.

This question came before the Supreme Court of Montana, where it was contended that an amendment to the attachment law was retroactive, and annulled certain attachment liens acquired and existing prior to the passage of the amendment, but the Court held the contrary. "It would give the statute under consideration the retroactive effect of abrogating the liens lawfully acquired by attachment, and existing when the present statute was enacted."

Ryan vs. Maxey, 35 Pac., 515.

Gunn vs. Barry, 15 *Wall.,* 610.

Even more directly to the point at issue is the following from the Supreme Court of Wisconsin:

"The act is in express terms retroactive. * * * The plaintiffs had not acquired by the service of the garnishee process any right to the remedy they had invoked, which could not be taken away from them by the act in question. The remedy was given by statute, and until *proceedings had passed into judgment*, the Legislature might change it, or take away the right of action altogether."

Freeberg vs. Singer, 90 Wis., 608; 63 N. W., 755.

The converse must unquestionably be true, that if it had passed into judgment as ours had, the Legislature could not have changed or taken it away. This conclusion is sustained by the best authority.

Endlich on Interpretation of Statutes, Sec. 281.

Hannah vs. Felts, 15 Iowa, 141.

Brenton vs. Severs, 12 Iowa, 389.

Hall vs. Stevens, 65 Mo., 670.

Kelly vs. Dill, 23 Minn., 435.

Tillotson vs. Millard, 7 Minn., 513.

Williamson vs. N. J. Ry. Co., 29 N. J. Eq., 311.

Grove vs. McDaniel, 1 McCord, 480.

People vs. Cameron, 7 Ill., 468.

Lyon vs. Sanford, 5 Conn., 547.

Myers on Vested Rights, p. 138 et seq.

Chestnut vs. McShane, 16 Ohio, 599.

1 Amer. Eng. Enc. of Law, p. 564, new edition.

3 Amer. Eng. Enc. of Law, p. 218, new edition.

1 Freeman on Judgments, Sec. 298.

1 Black on Judgments, Sec. 298.

Com. vs. Rosche, 40 Amer. St. Rep., 1653.

Lackey vs. Seibert, 23 Mo., 85.

But we have higher authority than all those. The Supreme Court of the United States has considered the same question in *Tyrell vs. Rountree*, *7 Pet.*, *464*. Speaking through that greatest of judges, Ch. J. Marshall, it said:

"An interest was vested in him for the purpose of that judgment. The judgment did not create a general lien on it, but was a specific appropriation of the property itself to the satisfaction of that particular judgment. The process which issued did not direct the officer to levy it on the property of the defendants, but to sell that specific property which was already in his possession by virtue of the attachment and was already condemned by the judge of a competent tribunal. The subsequent division of the county could not divest this vested interest, or deprive the officer of the power to finish a process which was rightly begun."

The case relied on by interpleaders in the lower Court, and the one upon which the Court principally based its decision, was *Green vs. Abraham*, *43 Ark.*, *420*.

That case did not construe any statute involved in this case, or put in force in the Indian Territory, and it is only authority so far as it is intrinsically entitled to weight as such. If, therefore, it is not based either on authority or sound reasoning, it must not be followed. Not only can we readily show both, but show further that its conclusions contravene both the authorities it cites and its own, as well as all other sound reasoning, if it is not susceptible of the construction placed on it by the Court of Appeals in the Indian Territory in its first opinion. In that case judgment had been obtained and execution levied on property upon which was a mortgage, which had not been properly recorded. The property (corn) was seized by the constable under his execution in October, 1882, the defectively acknowledged deed of trust on it having been executed March 1, 1882.

On March 8, 1883, an act was passed healing the defective acknowledgement. The case was tried in August, 1883. The Supreme Court at its November term, 1884, held that

the deed "imparted no notice to subsequent purchasers or incumbrancers." It further said that "such healing acts are not permitted to interfere with or disturb vested rights."

But it said that no vested right was acquired by the levy of the execution. If, then, the lien of an execution is a vested right, the decision is in the teeth of its statement of the legal principle.

In *McKeithan vs. Terry*, *64 N. C.*, 25, the Court said that by the levy of an execution the plaintiff acquired a "specific lien"—a "vested right."

"Nothing less than the satisfaction of the debt, or some recognized act of abandonment, or waiver, either by the creditor or officer, can have the effect to destroy the title vested by the levy."

Herman on Executions, *Sec.* 172.

"The right of the judgment-creditor to have satisfaction becomes vested by the levy of his execution. This right is treated as property, because it is of the same essential nature as other property, and a statute which undertakes to supersede the right by validating a lien which could not have been interposed when the levy was made, is obnoxious to the objection that it is a law depriving one of his property otherwise than by due process of law, or the law of the land."

Wade on Retroactive Laws, *Sec. 168.*

"The rights of the Iron and Coal Company in the property in controversy were fixed and became vested rights in January, 1874, when the levy was made under the executions. By the act concerning executions, the property was bound by the execution from the time of delivery to the sheriff, and upon levy made, title under the execution would be good, even as against subsequent *bona fide* purchasers. (*Rev. St.*, *p.* 392, *S.S.*, 18–20.) By force of the last mentioned act, and the act concerning chattle mortgages, as it then stood, the Iron and Coal Company, upon the levy being made, acquired a right to the property seized under its execution superior to that of the complainant under his mortgage. That right of property,

being a vested right, was not divested by the act of 1876.

* * * * * *

"Indeed, a right partaking of the nature of property, such as became vested in the Iron and Coal Company upon the levy of its execution, is clearly within the principle of the constitutional provision which protects private property from legislative action, and forbids its being taken without compensation, for either public or private purposes."

Williamson vs. N. J. Ry. Co., 29 N. J. Eq., pp. 333-334.

See also *Warren vs. Johns, 9 S. C., (9 Rich), 288.*

There cannot be found any case where the doctrine is more strongly stated against that case than in *Gunn vs. Barry, 15 Wall.*, 610 *L. Ed.*, 212:

"But the act reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is, in effect, taking one person's property and giving it to another without compensation. This is contrary to reason and justice and to the fundamental principles of the social compact."

In Virginia, where a judgment is a lien on all the debtor's real estate without the levy of an execution, the Supreme Court of that State said: "The lien had become fastened on the land before the appellant acquired, etc. * * * It was a vested right."

Kennerly vs. Swartz, 37 S. E. Rep., 348.

Merchants' Bank vs. Ballou, 32 S. E., Rep., 481.

(a) *The judgment sustaining the attachment was in proper form.*

It is urged in view of the language of some of the cases cited, that our judgment was incomplete because it did not

condemn the property to sale, or provide for a special execution. An order of sale was neither necessary nor proper, for the property had been taken under *Section* 390 *of Mansfield's Digest*, and no order could be made until the trial of the interplea, when all proper orders should and would be made under *Sections* 351 *and* 391. Under those sections, as well as under the general attachment procedure, no order of sale is necessary, as the law imposes that duty upon the sheriff any way.

Mansfield's Digest, Secs. 347, 380.

Anderson vs. Goff, 1 Amer. St. Rep., 34.

Waymant vs. Dodson, 12 Iowa, 22.

With us, an attachment is a purely ancillary remedy, and it is simply to secure the satisfaction of the judgment in the main issue.

Ferguson vs. Glidewell, 48 Ark., 200.

Under our practice, the lien is perfected when the attachment is *sustained.*

"By levy of the attachment and judgment *sustaining* the same, such inchoate lien is perfected."

Cross vs. Fombey, 54 Ark., 183.

Richardson vs. Adler, 46 Ark., 49.

A special execution is no longer issued under our practice. Its necessity was done away with in Arkansas by the adoption of the Civil Code.

Field vs. Dorch, 34 Ark., 407.

Waples on Attachments, 1st Ed., p. 506.

Wallace vs. Bogel, 2 S. W., 96.

Van Diver vs. Buckley, 1 So. Rep., 633.

V.

The Attaching Creditor in This Case Stood on the Same Footing as a Purchaser for Value.

Much stress was laid on this feature of the case in argument below, and the changes were time and again rung on that expression of Mr. Cooley in his work on *Constitutional Limitations* (*5th Ed., p. 466*), where he states that the operation of such curative statutes must be restricted to the parties to the original contract and "to such other persons as may have succeeded to their rights with no greater *equities*."

Now, it is true that an attaching creditor takes his rights subject to all outstanding equities of which he has notice, but let us see what equities, if any, the interpleader had. *Its* right, if good against third parties, was a legal one; if bad, it was none at all. In other words, a legal title which the law declares fraudulent, can never be converted as against the same parties, in a good, equitable one. The doctrine of equities comes in, where, at the time of the levy, the debtor had no interest in the property. Where fraud in law or fact enters into the transfer, the law says the title never passed out of the debtor and the property is subject to levy.

The only way for Blocker to have been divested of his title as against third persons, or his creditors, was by the interpleader's taking possession under the mortgages, or in lieu thereof, complying, if it could, with the recording laws. (*Rainwater-Brogher Hat Co. vs. Macolm, 51 Fed. Rep., 734*). Neither was done, and as to all third persons, the title remained in Blocker. It is useless to multiply authorities to show that under our practice an execution creditor, and even an attaching creditor, before judgment on his debt can defend against and attack the fraudulent transfers of his debtor.

1 Shinn on Attachments, Sec. 320.

The rule as to equities, as we have before stated, has no

application here. If, at the time of the levy, the debtor has no interest in the property, the attaching creditor is not in the position of a *bona fide* purchaser, and superior equities would prevail; but if the debtor *previously* had a *legal* title, and has fraudulently divested himself of it, then the attaching creditor is on a different footing; he is not simply a creditor at large, but a creditor having a specific lien on the property attached.

Bostwick vs. Blake, 34 N. E., 38.

1 Shinn on Attachments, p. 615.

"And in a subsequent case, where a sheriff was sued by one claiming attached property under an assignment from the defendant, which the sheriff alleged to be fraudulent as against the defendant's creditors, that court held that an attachment in the hands of an officer authorized him to seize any property which the defendant had disposed of in any manner with intent to defraud his creditors; that the attaching creditor was not, after service of his attachment, to be deemed a mere creditor at large, but a creditor having a specific lien upon the goods attached; and that the sheriff, as his bailee, had a like lien, and had the right to show that the assignee's title was fraudulent as against attaching creditors."

Drake on Attachments, 6th Ed., Sec. 225.

Tennant vs. Watson, 58 Ark., 252.

The interpleader here never at any time had any title to the property in question against these parties. The mortgages under the recording acts being void as to all sorts of creditors, the interpleader neither acquired any title or any equity in opposition to their claims. As to attaching creditors, the title remained in Blocker the same as though no mortgage was ever given.

Pingrey on Chattel Mort., Sec. 800.

(a) *Mortgages in question were fraudulent and passed no title.*

One of the counsel for interpleader contends that there was no law at all here at the time of the recording of the mort-

gages, with reference to the recording of mortgages given by non-residents, and that the common law on the subject prevailed. All the statutes he invokes to aid him stood in Arkansas as they stand in the Indian Territory, and it was in the light of them all that the decision in *Watson vs. Lumber Co., 49 Ark., 83*, was rendered. That case decided that a mortgage, (in exactly the same predicament as the ones in controversy were prior to the passage of the so-called curative act, relied on by the interpleader) "was not valid against the creditors who sued out executions and caused the same to be levied before the commencement of this action, as to the personal property levied on." Such mortgages then stood on the same ground as all other chattel mortgages, and the statute (*Mansfield's Digest, Sec. 4742*) said that all such shall be "recorded in the county in which the mortgagor resides."

It is useless to cite authority on the proposition that such mortgages in this jurisdiction, not recorded, did not constitute a lien as against creditors, even though they may have had actual notice of their existence. The reason of this is that the recording act made such mortgages fraudulent as to third parties, and a fraudulent mortgage never conveys title against attaching, or any other sort of creditors. This question was clearly settled in Arkansas in a very early day.

"The attachments found the rights of the mortgagee in an inchoate and imperfect state, subject to be divested either by a subsequent purchaser or a judgment creditor, and transferred it into the custody of the law, with all its imperfections upon it, to await the final judgment of the law. The instant it passed into the custody of the law it went out of the reach of all persons having mere inchoate rights, and those rights, if not utterly destroyed, must at least remain in abeyance until the property shall be legally released from the grasp of the attachment. The law regards a mortgage which has not been acknowledged and filed for record, as a fraud upon the rights of strangers, and consequently, it will not countenance and uphold it in opposition to such rights."

Main vs. Alexander, 9 Ark., 117.

This last case seems to be a thorn in the side of all our opposing counsel. They have plainly seen that unless they can break the force of this decision they have no standing before the Court. Unfortunately, however, the multiplicity of counsel in this case has brought about the same result that too many cooks do to the broth.

One of the counsel for defendant in error in a former brief, said: "We admit that the law of actual notice was repealed as to resident mortgagors." He thereby places the State of Arkansas in the very anomalous position of placing restrictions upon the transfer of personal property by its own residents and yet allowing non-residents the very privilege denied its own. But the distinguished counsel who filed the additional brief in the case seemed to differ very widely from him, and not only assert, "that the general rule is that actual notice is equivalent to registration (*p. 2*)," but endeavored to show (*p. 34*) that this is the rule existing today in the State of Arkansas, and that by the best reasoned decisions in that State (*p. 39*), "notice is equivalent to registration as to all persons." After a most laborious and painful attempt to explain away the long and uniform series of decisions by the Supreme Court of that State to the contrary they finally based their hope upon the decision rendered in 1855, of *Byers vs. Engles, 16 Ark., 543*.

The conveyance in that case was a conveyance of real estate and not of chattels, and was therefore regulated by an entirely different statute from the one touching the case in hand. The statutes construed in *Byers vs. Engles*, are *Sections 670 and 671 of Mansfield's Digest*. It will be seen in *Section 671* that as to subsequent purchasers of real estate actual notice took the place of registration, but the statute on that point was apparently silent as to creditors, putting them upon higher ground than subsequent purchasers, a thing which no Court would permit a statute to do, if any fair construction would permit it to do otherwise. So the Court simply decided

in that case that as actual notice was good in conveyances of real estate against subsequent purchasers, it must also, under that statute, be equally good against creditors that they stood on the same plane. But the Court could not have decided otherwise, no matter what the statute may have been, because not only did the purchaser of the land purchase it and pay for it and get his deed of conveyance for it long before the judgment under which the plaintiff in the case claimed as purahaser was rendered, but he was actually in possession of the premises; and that would have been good anywhere and against anybody or anything. Applying this construction given then to the laws governing recording of deeds of real estate to the laws governing the record of chattels in Arkansas we are enabled to further sustain our position. The ruling in the various cases as to notices by the Supreme Court of Arkansas is in the language of the statute itself, which is as follows:

"Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be *notice* to all persons of the existence of such mortgage."

We see from the very wording of the statute itself that the instrument without recordation constitutes no lien on the property, and that filing shall be the only notice of its existence. Attention is specially called to this construction in *Dodd vs. Parker, 40 Ark., 536*, and *Ford vs. Burke, 37 Ark., 94*. In every other State also where the statute has provided that unrecorded mortgages constitute no lien, a similar construction has been placed upon them.

20 Amer. Eng. Enc., p. 590.

Stansell vs. Roberts, 42 Amer. Dec., 193.

Trader's Nat'l Bank vs. Woodlawn, 96 N. C., 298; 3 S. E., 363.

Travis vs. Bishop, 13 Met. (Mass.), 304.

Ross vs. Menifee, 125 *Ind.*, 432; 25 *N. E.*, 545.

Blevins vs. Bolton, 31 *Mo.*, 437.

With that construction then on *Sec. 4743*, the Legislature of Arkansas in 1877 passed an amendment to its mortgage laws beginning with *Sec. 4750* and ending with *4756*. By this law a mortgage simply filed but not recorded would be good for one year against everybody, but *Sec. 4751* provides that "every mortgage so endorsed and filed shall be void as against the creditors of the person making the same, or against subsequent purchasers and mortgagees in good faith, after the expiration of one year after the filing thereof, unless within 30 days preceding the expiration of one year from such filing and each year thereafter the mortgagee, his agent or attorney, shall make an affidavit exhibiting the interest of the mortgagee, etc."

In that case we see that after the expiration of one year the mortgage is absolutely void as to creditors of every kind, notice or no notice. By parity of reasoning from the case of *Byers vs. Engles*, *supra*, it would be a strange Legislature that would make one sort of a chattel mortgage void against creditors, although they had actual notice of its existence by virtue of seeing it on file in the clerk's office, and yet apply a different rule to a deed filed for record, which did not comply with the prerequisites of a valid and proper recordation of it. It is perfectly clear from the recording act in force in this jurisdiction that general creditors enforcing a lien, and suqsequent purchasers in good faith, are put on the same footing and each has the equal right to take advantage of improperly recorded conveyances. A creditor in such acts is simply defined to be one armed with some legal process which authorizes him to seize the property, such as an attachment, etc.

Bullard vs. Kenyon, 21 *N. Y. Sup.*, 32.

Jones vs. Graham, 77 *N. Y.*, 628.

The rights of an attaching creditor to levy on the property upon which there was an unrecorded mortgage, and one, by the way, given to a non-resident corporation, was recently passed on by the Eighth Circuit Court of Appeals in the case of *Hunter-Hutton-Evans Commission Co. vs. Quigg & Barrenger, 97 Fed. Rep., 735.* The Court says: "Under the statutes of Arkansas, which are in force in the Indian Territory, an order of attachment binds the property of the defendant in the county, which might be seized under it and against him from time of the delivery of the order to the sheriff or other officer," and every chattel mortgage is required to be recorded and it becomes a lien upon the mortgaged property when it is filed and not before that time. *Mansfield's Digest of the Laws of Ark., Secs. 325, 4742, 4743; Cross vs. Tombey, 54 Ark., 179, 181, 182.* The mortgages here in question were never recorded in the Indian Territory and hence they never became a lien upon the property attached unless they were validated, and that lien was created by the possession taken by the mortgagees."

Our statute declares all mortgages of chattles not filed in the county in which the mortgagor resides "void as against creditors," exactly the same wording found in the statute of New York made a mortgage filed in the wrong county void, according to the views of the Supreme Court.

Stuart vs. Platt, 101 U. S., 731.

Cobbey on Chattel Mortgages, Sec. 575.

"At the time the property in this case was attached the sale was void as to the attaching creditor, and the property was therefore, as to him, the property of the vendor, the defendant in the attachment. It was not in the power of the Legislature to divest the lien so created by subsequently declaring the property to be that of the vendee, or by allowing the vendee by proof to establish as to the creditor the validity of a sale declared to be void as to him by the law."

Conrad vs. Smith, 70 N. W. Rep., 817.

"The grantor who has conveyed away his land by an unrecorded deed, it is true, has no title or interest remaining in himself, yet his deed to an innocent purchaser for value, avoids, by virtue of the registry statute, the prior conveyance, and vests title in the subsequent purchaser."

Memphis Land Co. vs. Ford, 7 C. C. A., 304.

Bishop vs. Schneider, 2 Amer. Rep., 540.

Secard vs. Davis, 6 Pet., 124.

Jones vs. Graham, 77 N. Y. 628.,

2 *Cobbey on Chat. Mort.*, Secs. 616, 625, 754.

40 *Central Law Journal*, 27.

(b) *Plaintiff's were Purchasers for Value.*

"As against a deceived vendor, an attaching creditor of the fraudulent vendee is not an innocent purchaser for value."

Taylor vs. Mississippi Mills, 47 *Ark.*, 252.

That was true because, as we have shown above, the attaching creditor must stand on the title in his debtor at the time of the levy. Here was a case for the doctrine of "equities." Applying the same reasoning applied above to Blocker's transfer, no title ever passed to the fraudulent vendee, and there was nothing to levy on. But the converse of that proposition is also true; if the property had been levied on in the hands of the fraudulent vendee as the property of the deceived vendor, the attaching creditor might have occupied the same position as a purchaser for value.

"When the registry shows a title subject to attachment, the attaching creditor, by something of a stretch, is regarded in the light of a *bona fide* purchaser, to whom the recorded deeds have been exhibited, and to whom the conveyance over has been disclosed."

Cooley vs. McLaughlin, 141 *Mass.*, 181; 4 *N. E. Rep.*, 821.

"The attaching creditor stands in the light of the purchaser and is to be protected as such."

Burrell vs. Robertson, 5 *Gillman (Ill.)*, 289.

Green vs. Van Buskirk, 74 *U. S.*, 139.

"So far as knowledge of a previous conveyance affects the validity of the transaction, the attachment of land is like the purchase of it. Both the attacher and the purchaser of land which they know to have been conveyed previously, are alike at fault. What is sufficient notice to one is sufficient to the other.

"Considered as in the nature of a purchaser the attaching creditor is deemed to have made his purchase at the time of the laying of the attachment writ upon the land; for, if execution should follow, the purchaser at the sale would look to the state of things existing when the property was attached."

Waples on Attachments, *1st Ed.*, *p. 501.*

"The policy of the law is to place attaching creditors on the same basis as purchaser for value. The lien of the attaching creditor is deemed to create an equitable title equal to that of a purchaser."

1 Shinn on Attachments, *Sec. 417.*

"A creditor by attaching property, or levying an execution thereon, acquires an interest in the property, which gives him the right to contest a prior mortgage on the ground of fraud."

2 Cobbey on Chattel Mortgages, *Sec. 774.*

VI.

Reasons for Sustaining Curative Acts Do Not Apply to This Case.

In addition to the established rule that such acts can never be construed so as to have the effect of divesting vested rights,

certain other restrictions are thrown around them. They were designed to right wrongs and never to perpetrate them; therefore, they are sustained upon certain worthy and commendable grounds, and they are never extended beyond them.

(a) Always restricted to the parties and those having no higher equities.

We have before endeavored to show that the question of superiority of equities does not enter into this sort of case.

The plaintiffs were no parties to these mortgages, or any transaction out of which they grew. They have not placed themselves in any position which would make it inequitable or wrong for them to take advantage of their defects.

Meigher vs. Strong, 6 *Min.*, 111.

Green vs. Drinker, 7 *Watts & S.*, 440.

Bigelow vs. Topliffe, 60 *Amer. Decs.*, 264.

Barrett vs. Barrett, 26 *S. E.*, 691.

7 *Lawson's Rights and Rem.*, *Sec.* 3868.

Ala. Ins. Co. vs. Barker, 65 *Amer. Decs.*, 349.

Wade on Retroactive Laws, *Sec.* 260.

Black's Constitutional Prohibitions, *Sec.* 207.

Black's Constitutional Law, *p.* 545, *Sec.* 199.

Derninger vs. McDonnell, 41 *Ill.*, 227.

Even if the question of superior equities did enter into this case, the superiority of our lien must still prevail. The same rule would apply here that applies in determining the priority of rights of different attaching or execution creditors. For in any view of the case it is a question of priority of statutory liens.

"The rights of attaching creditors, who, as against their common debtor, have equal claims to the satisfaction of their

debts, must depend on strict law, and if one, by any want of regularity or legal diligence in his proceedings, loses a priority once acquired, it is a case where no equitable principles can afford him relief. Where the equitities are equal, the right must be governed by the rule of law."

Drake on Attachments, Sec. 262.

"The sale was made to Smith and the sheriff's deed executed on the day following. The land had been attached prior to that time, so that the lien of the judgment under which the land was sold related to a time prior to that of defendant's purchase. If, therefore, it should be conceded that he acquired title to the lands in controversy, by his purchase from Earley, he took it subject to the lien of the attachment. It follows, then, that whatever equities he may have must yield to the superior equities of the plaintiff *qui prior est tempore, potior est jure.*"

Hill vs. Baker, 32 Iowa, 311.

(b) Designed to affect only the mode of proof.

Such acts are sustained because they operate on the deed and change the mode of proof. They do for the unwilling debtor what equity and good conscience should compel him to do. He is estopped by an express act of the legislature from taking advantage of a legal technicality in a matter in which he has received full consideration and has nothing to complain of and to take advantage of a thing which would enable him to "eat his cake and have it still"—a violation of principles of sound morality. In short, they are cases where a moral obligation existed, and the legislature gave it legal effect by a retroactive statute. No man has a vested right in a rule of evidence, and so long as a curative act does no more than change that, it is perfectly valid.

Grove vs. Todd, 20 Amer. Reps., 79.

Black on Const. Law, Sec. 154, p. 434, First Ed.

Conrad vs. Smith, 70 N. W., 815.

Summer vs. Mitchell, 10 So. Rep., 562.

Black's Constitutional Prohibitions, Sec. 210.

Wade on Retroactive Laws, Sec. 258.

Hulbert vs. Hendrix, 26 S. W. Rep., 911.

In passing curative acts the legislature only assumes to do for the debtor what he might have been compelled to do by a Court of Chancery. Nobody would contend that the court, in compelling a man to cure defects in such matters, could go further and destroy the force and effect of intervening liens or incumbrances.

"If the official is dead or cannot be found, or if his term of office has expired, the aid of equity may be invoked to correct the mistake by reforming the certificate of acknowledgement so that it will conform to the facts in the case."

Underhill on Evidence, Sec. 136.

"For if, argued the Court, as the statute created no new title, and affected no new rights, but such as equitably flowed from the grantor, and only accomplished what, upon the principles of justice, a Court of Chancery ought to decree, there could be no sound objection to its retroactive operation."

Black's Constitutional Prohibitions, Sec. 210.

Simpson vs. Montgomery, 25 *Ark.*, 370.

(c) *Valid when they only take away the right of a party to avoid his own contract.*

This proposition is so intimately connected with the foregoing that the authority to sustain it may be plentifully found in authorities already cited.

(d) *Valid when they merely affect the remedy.*

What was previously said with reference to rules of evi-

dence, is applicable to remedies. A man has no vested right in a remedy, and can acquire none, until he prosecutes his rights under it to judgment. Then they are protected as all other vested rights. Having prosecuted our claim to judgment, our rights under the remedy were complete. Therefore, the new act could not affect the remedy, but if anything, our completed and perfected lien, which is property.

"A lien is a right of property, not a mere matter of procedure."

Rodd vs. Heartt, 88 U. S., 558 L. Ed., 663.

VII.

If the Curative Act Went Further It Would Be a Usurpation of Judicial Power.

The several departments of the Federal Government are separate and distinct. The functions of each are well defined, and the Constitution does not permit any one of them to usurp the powers of either of the others.

If the contention of the interpleader in this matter is correct, it is in effect saying that a deed which was fraudulent at the time the attachment was issued, and was so at the time it was sustained, shall not be so in this case, but a judgment which was correctly rendered, and was perfectly valid when rendered, is set aside and a legislative new trial is granted. The policy of the law is not changed. Chattel mortgages still remain fraudulent and void as to creditors and subsequent purchasers, unless put on record in the manner prescribed by statute, but we will give these people a legal advantage which those who went before never had, and which those who come after shall not have.

Ogden vs. Blackledge, 2 Cranch, 272.

Chestnut vs. McShane, 16 Ohio, 558.

Lawson vs. Jeffres, 47 Miss., 686.

Burt vs. Williams, 24 Ark., 91.

Atkinson vs. Dunlap, 5 Me., 111.

Bumbach vs. Singer, 56 N. W., 873.

Allison vs. Louisville Ry., 9 Bush., 248.

Menzes vs. Deutzler, 33 Penn. St., 495.

Burch vs. Newberry, 10 N. Y., 374.

Black's Constitutional Prohibitions, Secs. 199, 209.

Wade on Retroactive Laws, Sec. 158.

Sidway vs. Lawson, 58 Ark., 121.

3 Amer. Eng. Enc. of Law, 682.

Ratcliffe vs. Anderson, 31 Amer. Rep., 720.

VIII.

The Amendment was a Partial Repeal of the Old Statute, and Liabilities Incurred Under it Remained Unaffected.

If it is construed only as an amendment and as not repealing in any respect the former law it must be construed prospectively.

If simply an amendment, the original act continues in force with regard to all rights that had accrued prior to such amendment.

Thatcher vs. Brd. Steuben Co., 47 N. Y. Sup., 124.

"The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along, and the new parts, or the changed portions, are not to have been taken to have been the law at any time prior to the passage

of the amended act. The change takes effect prospectively according to the general rule."

Southerland on Statutory Construction, Sec. 133.

See also:

Ely vs. Hutton, 15 N. Y., 595.

But the same author says that the provisions of the former derive their force thereafter solely from the amendatory act.

Under the old statute all chattel mortgages given by non-residents and not accompanied by delivery of possession to the mortgagee or his agent were in law fraudulent and void in this jurisdiction, except between the parties, because they could not be recorded. The new act supplied this defect and that far repealed the old statute. Both being acts of Congress, all rights accrued under the law are protected.

Rev St. U. S., Sec. 13.

Wade on Retroactive Laws, Secs. 292, 298.

Fabri vs. Murphy, 95 U. S., 191, Law Ed., 468.

Files vs. Fuller, 44 Ark., 281.

No Federal Court has ever been called on to construe the forgoing section of the Revised Statues when applied to a civil liability, but several of the State Courts have.

The State of Indiana has the same statute, word for word. Its Supreme Court has decided that rights like ours, leaving out altogether the question as to whether they are vested or not, cannot be lost, either by an amendment or repeal of the law under which they were acquired.

Daggy vs. Ball, 34 N. E., 247.

United States vs. Williams, 19 Pac., 288.

Wade on Retroactive Laws, Sec. 297.

IX.

If Retroactive, It Impaired a Contract.

It is true there is nothing in the Constitution of the United States inhibiting Congress from passing laws impairing the obligation of contracts, and many laws passed by Congress under express authority conferred on it have been sustained by the Court, although their effect was to incidentally and indirectly impair the obligation of contracts, such as bankrupt laws, etc. But no one would contend that Congress could pass a law whose sole and necessary effect would be to impair the obligation of a contract.

Waples on Homesteads, p. 279.

2 Beach on Mod. Contract Law, Sec. 1633.

Is a judgment such a contract?

"The judgment recovered by Anderson against Ratcliffe was a contract of the highest nature, and any legislature which authorizes a Court to reopen that judgment and reduce it in amount necessarily impairs its obligation."

Ratcliffe vs Anderson, 31 Amer. Rep., 721.

Black on Constitutional Prohibitions, Secs. 130, 131.

Bishop on Contracts, Sec. 556.

X.

The Original Act Was Not in Violation of Section 2 of Article IV of the Constitution.

As we have said before, the interpleader endeavored to record its mortgages in the Northern District of the Indian Territory, although the mortgagor was a resident of the State of Texas. A mortgage so recorded has been held to constitute no lien by the Supreme Court of Arkansas.

Watson vs. Thompson Lumber Co., supra.

Stuart vs. Platt, supra.

The interpleader in the trial below introduced proof to show that J. R. Blocker, the mortgagor, was also a citizen as well as a resident of the State of Texas, and that inasmuch as the act provided a place for the recordation of mortgages of residents, and none for non-residents, it deprived the mortgagor of the privileges and immunities guaranteed by the *Second Section of Article 4, of the Constitution of the United States.* Both precident and reason are against this position, even if the laws were being attacked in the State of Arkansas. Such laws have existed in many of the States and been upheld without ever being attacked for any such reason.

Jones on Chat. Mort., Sec. 26.

Stewart vs. Smith, 14 N. W., 310.

Montgomery vs. Wright, 8 Mich., 143.

II. Cobbey on Chat. Mort., Secs. 575, 578.

Smith vs. Moore, 11 N. H., 55.

Blaver vs. Frick Co., 53 Ark., 18.

Indeed, the principle case upon which the Court below relied was from the Supreme Court of Indiana declaring a law depriving non-residents of the privilege of becoming trustees void. That same Court has held a law like ours good.

Granger vs. Adams, 90 Ind., 87.

The privileges and immunities guaranteed therein are those which belong to citizenship, and which belong of right to the citizens of all free governments and are not intended to give to the law of one state any force in another state, nor are special privileges enjoyed by citizens in their own states secured in other states thereby. No privileges are secured by this Article of the Constitution except those which belong to citizenship. It simply means that citizens of each state can in

any other state hold property by the same titles by which every other citizen may hold it, and that no law must be passed which would place any citizen of any state in a worse situation than a proper citizen of a particular state.

Conner vs. Elliott, 18 How., 591.

Lemmon vs. The People, 20 N. Y., 608.

This law did not discriminate against citizens, but against residents of the same state. It was not such a law or immunity of the State of Arkansas when it was in force there, because it denied the right of one resident to record a mortgage of property in any other county than that of his residence.

Redd vs. St. Francis Co., 17 Ark., 422.

In other words the law relates only to residence, and not to citizenship.

Cent. Ry. Co. vs. Ga. Ry. Co., 11 S. E. Rep., 192.

In the recent case of *Blake vs. McClung, 172 U. S.*, 239, a question arose about rights of residents and non-residents. But the court there decided that it involved more than that, asserting that the statute discriminated against citizens of other states, and while that case is not at all against the conclusion reached in this case, we think the statements of Mr. Justice Brewer, in his dissenting opinion, so clearly present the distinction involved in our case, we quote one paragraph from it:

"So that neither the statute, the pleadings, nor the decree, raised any question of citizenship, or gives any priority outright to citizens of Tennessee, or of citizens of other states, but only discriminates between residents and gives residents of the state priority."

Non-residents and citizens of other states were not deprived of any property right. They were not debarred from taking mortgages on property in a state, of acquiring property

or of securing their debts. They simply had to take possession of the property instead of being able to record their mortgages. The object of the recording act was never to confer any benefit upon mortgagors, but to confer a benefit upon creditors and subsequent purchasers, both resident and non-resident, in preventing fraud and deception by precluding the mortgagor of personal property from holding himself out to the world as an unqualified owner of property which had been conveyed by a mortgage. It merely says to the mortgagor that he must either give possession to the mortgagee or give notice to his creditors and those who may become his creditors of his transfer by recording the mortgage as required by the statute.

Mr. Justice Clifford says in *Ward vs. Md.*, *12 Wall.*, *418*:

"Beyond doubt, those words (privileges and immunities) are words of very comprehensive meaning, but it will be sufficient that the clause plainly and unmistakably secure and protect the rights of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce without molectation, to acquire personal property, to take and hold real estate, to maintain actions in the courts of the United States and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens."

Certainly none of these things were prevented or impaired by the provision of law under consideration.

The property of a non-resident under the laws of almost every State in the Union may be attached without the right of exemption which is accorded to a resident of the State. So a statute dispensing with a bond in attachment proceedings where the defendants are non-residents, or requiring bond of non-residents before bringing suits, have, in numberless cases been held valid and no violation of the federal constitution.

Pyrolusite-Manganese Co. vs. Ward, *73 Ga.*, *491*.

Head vs. Daniels, *38 Kan.*, *9*.

A similar matter was recently passed on in *Central Loan & Trust Co. vs. Campbell Commission Co., 173 U. S., 98.*

In Oklahoma, where this case arose no bond was required in cases of attachment against a non-resident. Counsel for the non-resident contended that where non-residents "are not capable of separate identification of residence by any fact or circumstance other than that they are non-residents, the laws of a State or Territory cannot treat them to their prejudice upon that fact as a basis of classification." The Court in replying said: "The misconception consists in conceding on the one hand the power to classify residents and non-residents for the purpose of the writ of attachment and then from this concession to argue that the power does not exist unless there be something in the cause of action for which the attachment is allowed to be issued which justifies the classification. As, however, the classification depends on residence and non-residence and not upon the cause of action, the attempted distinction is without merit." So have laws been held valid providing that the statute of limitation should run against a person if he resides in the State, but not if he resides out of the State.

Chenning Canal Bank vs. Lowery, 93 U. S., 72.

Various other discriminations against non-residents similar to the one under consideration have invariably been upheld by the Court because it is merely an exercise of those powers of police that were reserved to the states at the time the original constitution was adopted.

Cummings vs. Mingo, 10 S. E., 110.

State vs. Dent, 129 U. S., 114.

Garzza vs. Tierman, 148 U. S., 657.

Black on Const. Law, p. 228.

Cribbs vs. Benedict, 44 S. W., 710.

Taggart vs. Claypool, 44 N. E., 18.

Lee vs. Lyde, 20 So., 410.

6 *Amer. Eng. Enc. of Law*, 2d Ed., 69.

Thorpe vs. Ry. Co., 27 Vt., 149.

State vs. Randolph, 31 Pac., 201.

Reno on Non-residents, p. 16, Sec. 15.

Col. Pollard on pages 63 and 69 of his brief ridicules our contention that the registration laws are passed by virtue of the powers of police possessed by the sovereignty passing them. After satisfying himself thoroughly of the absurdity of our position, he says: "From all which one must indeed have a very viv d imagination if he can place within the category mentioned, a registration Act." We are glad to be able to shift the responsibility; for this error we are indebted to this Court. In the case of *Pycatt vs. Powell*, 51 Fed., 551, this Court was called upon to consider a mortgage made, executed and recorded in the State of Kansas, securing a debt upon property which was subsequently removed to the Indian Territory. That case came on for trial prior to the passage of the Act of Congress extending over this Territory any statute for the registration of mortgages. In discussing the effect of the registration of this mortgage in Kansas this Court said: "The registry Act of Kansas was in the nature of a police regulation of that State." We thought that was the law before we saw it written there, and Col. Pollard to the contrary, we think so yet.

The Indian Territory is not an organized Territory and derives its law direct from Congress, and the United States therefore exercises this police power over it.

United States vs. Dewitt, 9 *Wall*, 41.

Such statutes, no matter how passed, are but the regulations of the manner of transferring property and not a restriction upon its transfer.

Burlington vs. Grosvenor, 46 Kan., 730.

Even if we should admit that the law was unconstitutional as a law of the State of Arkansas it certainly cannot be unconstitutional as a law of the United States in force in the Indian Territory. The constitutional provision in question simply prevents each state from discriminating in favor of its own people or against those of any other state.

Davis vs. Peirse, 7 Minn., 13.

Paul vs. Virginia, 75 U. S., 168.

Scott vs. Sandford, 60 U. S., 393, p. 15 L., Ed. 69.

Our statute is not now a law of Arkansas, but a law of the United States, and the constitution has not the same force and effect in the territories and especially the Indian Territory, that it has in the states. The Indian Territory was not organized under the Constitution. It was a creation of the treaty-making power on the first hand and the legislative department on the other, and both under the general law as well as the treaties made with the Indians is subject to the supervision and control of the legislative department. All functions of government are within legislative jurisdiction of the Congress, certainly so far as citizens of the United States are concerned, and all territorial powers are subject to Congressional supervision.

Snow vs. United States, 18 Wall, 319.

Benner vs. Porter, 9 How., 242.

National Bank vs. Yankoln, 101 U. S., 132.

Murphy vs. Ramsey, 114 U. S., 44.

Talbot vs. Silver Bow Co., 139 U. S., 446.

Endleman vs. United States, 86 Fed. Rep., 459.

Shurly vs. Bowlby, 152 U. S., 48.

Mormon Church vs. United States, 136 U. S., 42.

The civil rights of the inhabitants of the Indian Territory are those guaranteed by treaty and conferred by Congress. They acquire no such rights under the Constitution and Federal Statutes *ex proprio vigore*. In the recent treaty with Spain the following expression is found: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." It may be said that such inhabitants would not then be citizens of the United States. One-third of the inhabitants of the Indian Territory are not citizens of the United States and no residents who have their domiciles here are citizens of any state. It is true that the Act of Congress of 1890, which adopted and put in force in the Indian Territory the laws which we are now considering, also extended over the Indian Territory the Constitution of the United States. But in doing so it has conferred those rights, if they did not have them before, upon the inhabitants of the territories that it confers upon all persons under the protection of the United States Government as such, and not those rights which the Constitution confers upon citizens of states as such.

The Supreme Court of Illinois in *People vs. Loeffler*, 51 *N. E.*, says:

"There is a difference between the privileges and immunities belonging to the citizens of the United States as such and those belonging to the citizens of each state as such. The privileges and immunities of the citizens of the several states are those which concern the personal private rights of the citizen. The Supreme Court of the United States has said that they may all be comprehended under the following general heads: 'Protection by the Government with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety is nevertheless to such restraint as the Government may prescribe for the general good of the whole.'"

Slaughter House Cases, 16 Wall., 36.

See also recent decision of Supreme Court, *Maxwell vs. Dow, Adv. Sheets No. 9, Mch. 15, 1900, p. 449.*

The 14th amendment deals with the rights of citizens of the United States as such, while the 4th article protects rights founded in the relation between the States and its citizens and not rights which belong to the citizens of the United States as such.

Conner vs. Elliott, 59 U. S., 591, 15 L. Ed., 49.

Black on Constitutional Law, pp. 227-229.

Justice Brewer in 136 *U. S.*, 44, has said with reference to the application to the Constitution in the territories that:

"Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers than by any express and direct application of its provisions."

The inhabitants of a State have a dual citizenship, State and Federal. The article of the Constitution under consideration guarantees to "the citizens of each State all the privileges and immunities of the citizens of the several States." But this inter-state citizenship is only granted to citizens of a State, not to citizens of the United States not also citizens of a State. There is no citizenship of a territory, and the only citizenship its inhabitants and residents have, or which Congress can confer, is national.

Prentiss vs. Brennon, Fed. Cases No. 11, 385.

United States vs. Cruikshank, 92 U. S., 542.

Piquet vs. Swann, Fed. Cases No. 11, 134.

It is perfectly plain, therefore, that unless a law deprives the inhabitants of a territory of some property or vested right, or personal liberty without due process of law, that Congress has plenary power of legislation over them.

Wharton Amer. Law, Sec. 464.

Sutherland on Statutory Construction, Sec. 23.

Thompson vs. Utah, 170 U. S., 349.

Cole vs. Cunningham, 133 U. S., 107.

As we have before said, this recording law only affected the residents of the counties, and was not intended to affect the property rights of anybody. The State thereby protected residents of one county from fraud and deceit from residents of other counties, and incidentally, non-residents of the State. The law bears equally upon all the citizens of the States.

Chief Justice Waite in *Nat'l Bank vs. Yankton, 101 U. S., 129*, says: "The territories are but political sub-divisions of the outlying dominion of the United States. They bear much the same relation to the general government that *counties* do to the States, and Congress may legislate for them as States do for their respective municipal organizations." If, therefore, States can make laws with reference to their own citizens' rights in their counties, Congress can make the same laws valid when put in force over a territory. The learned Judge who tried the case below contended that Congress could not prohibit the citizens of the states from doing business in the Indian Territory, unless the prohibition extended equally to the residents thereof.

The complete answer to that contention and this whole matter is found in the various sections of the *title 28, chapters 3 and 4 of the Revised Statutes of the United States*, and notably *Sections* 2117, 2128 to 2136.

Respectfully submitted,

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WILLIAM T. HUTCHINGS,

Attorneys for Plaintiffs in Error.

OCTOBER TERM, 1900.

No. 217.

WM. P. H. McFADDIN, ET AL, PLAINTIFFS IN ERROR,

vs.

EVANS-SNIDER-BUELL CO., ET AL, DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

J. P. CLAYTON,
NAPOLEON B. MAXEY,
WM. T. HUTCHINGS,
Counsel for Plaintiffs in Error.

Phoenix Printing Co., Muskogee.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 520.

WILLIAM H. McFADDEN, in his own right, W. P. McFADDEN and JAMES McFADDEN, Executors of William McFadden, Deceased ..... *Plaintiffs in Error,*

vs.

EVANS-SNIDER-BUEL COMPANY, C. W. TURNER, H. B. SPAULDING, et al ..... *Defendants in Error.*

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

The defendants in error have recently filed an additional brief in this case which gives us an opportunity to reply to it and some other matters in their original brief which we did not have the time to do when we originally submitted the case on printed briefs.

There is a slight mistake in the statement on page 7 of our brief, as the record shows that all of the cattle were located in the Indian Territory, and were so located when one of the deeds was recorded in the State of Texas. The defendant in error has thought of nothing apparently since this case was inaugurated except the herculean task of overthrowing the decision of *Main vs. Alexander, 9 Ark., 112*, and of vainly attempting to try this case by the decision in *Byers vs. Engles, 16 Ark., 543*. Now let us see the two statutes construed in those cases, and put them in parallel columns:

The statute construed in *Main vs. Alexander* is as follows:

"All mortgages, whether for real or personal estate, shall be acknowledged before some person authorized by law to take the acknowledgments of deeds, and shall be recorded, if for lands, in the county or counties in which the land lies; and if for personal property, in the county in which the mortgagor resides." * * * "Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before, which filing shall be notice to all persons of the existence of such mortgage." —*Rev. Stat., ch. 101, secs. 1 and 2.*

The statute construed in *Byers vs. Engles* is as follows:

"That all instruments affecting the title to real or personal property, whether in law or equity, which are required by law to be recorded, shall from the time the same are filed for record, be constructive notice to all persons."—*Sec. 30, Dig. p. 269.*

"That no deed, bond or instrument of writing, for the conveyance of any real estate, or by which the title thereof may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditory of any person executing such deed, bond, or instrument obtaining a judgment or decree (which by law may be a lien upon such real estate), unless such deed, bond or instrument, duly executed and acknowledged, or proven as it is or may be required by law, shall be filed for record in the office of the clerk and ex-officio recorder of the county where such real estate may be situated."—*Sec. 31, Digest, p. 269.*

These statutes and their amendments are correctly set out on pages 6, 7 and 8 of the additional brief of the defendants in error. The statute construed in *Main vs. Alexander* was passed by the Arkansas legislature February 20, 1838, and became law by the proclamation of the Governor March 30, 1839. The Act of February 20, 1838, was amended December 19, 1846, by adding

thereto the paragraph construed in *Byers vs. Engles*. The case of *Merrill vs. Dawson*, referred to in brief of defendant in error, did not construe either of the sections above referred to, nor did the case of *Fowler vs. Merrill, 11 How., 375*. This last case, much relied on in the brief of defendants in error, does not support their contention, but on the contrary supports our own. The mortgage in this case was recorded on the 29th day of December, 1837, nearly one year before the State of Arkansas had a law touching mortgages and the recording of the same. The law permitting and giving effect to the recording of mortgages was passed in 1839 and the suit which was brought attacking the mortgage was instituted on the 7th day of September, 1842. The judgment which this suit was brought to enforce was obtained on the 12th day of March, 1841. The deed then in question was on record at the time a law was passed permitting the recording of deeds, and the court held that that answered the purpese, and inasmuch as the judgment was not gotten for something like a year thereafter, the mortgage was duly recorded under a proper law and therefore could not be attacked. Notice what the court says upon this point:

"There is another view of this transaction, which, if necessary to revert to, would probably sustain this present mortgage. The Arkansas law to make a mortgage valid if recorded passed February 20, 1838, (Rev. Stat., p. 580). This mortgage was on record then, and since, and had been from December, 1837, thus covering the time when the law took effect * and when the respondents purchased. It was also acknowledged then, and though not before a magistrate in Arkansas, yet before one in Mississippi; and in most states the acknowledgment may be before a magistrate out of the state as well as in, if he is authorized to take acknowledgments of such instruments.

"Nothing appears in the record here against his power to do this."

At the time that case arose an at the time it was decided in the lower court the statute construed in *Byers vs. Engles* had not

been enacted and the court held that the deed was properly recorded before it was attacked under the statutes construed in *Main vs. Alexander*. Again, that mortgage was taken when there was nothing but the common law prevailing in Arkansas and was relied on at that time, so that the question of notice and *bona fides* might have been brought into the case but for the subsequent passage of the recording act, and would have been decided under rules prevailing under the common law and previous to passage of the recording act.

Main vs. Alexander has been approved in the following cases decided in the State of Arkansas, and has never at any time been adversely criticised:

Merrick vs. Avery, 14 Ark., 388.
Hannah vs. Carrington, 18 Ark., 105.
Jacoways vs. Gault, 20 Ark., 193.
Watson vs. Thompson, 49 Ark., 85.
Cross vs. Fombey, 54 Ark., 184.
Leach vs. Fowler, 22 Ark., 142.
Jarrett vs. McDaniel, 32 Ark., 602.
Neal vs. Speighly, 33 Ark., 68.
Martin vs. O'Bannon, 35 Ark., 68.
Mitchell vs. Wade, 39 Ark., 385.
Dodd vs. Poke, 40 Ark., 540.
Martin vs. Ogden, 41 Ark., 192.
Wright vs. Graham, 42 Ark., 148.
Hawkins vs. Files, 51 Ark., 419.
Chapman vs. Chapman, 55 Ark., 544.

The case was attacked very soon after it was rendered in *Merrick vs. Avery, 14 Ark., 388*, and the court had occasion to review its former decision, if deemed incorrect. It has been at-

tacked several times since, but the court has always held, and properly so, that the peculiarity of the language of the statute construed warranted the decision and warranted no other construction.

In *Martin vs. O'Bannon, 35 Ark., page 68*, the court uses thi language:

"This court has repeatedly declined to depart from the decision in *Main vs. Alexander, 9 Ark., 112*, which was founded upon the strong and *peculiar* language of the mortgage statute, and became a rule of property, that an unrecorded mortgage is not a lien against strangers, though they have actual knowledge of its existence."

In referring to the case again, in *Martin vs. Ogden, 41 Ark., 191*, we find the following:

"Upon the other hand, it is as much closed from question that an unrecorded mortgage, however honestly made, is wholly invalid against attaching creditors, or persons obtaining a specific lien, or even subsequent purchasers who take with the full knowledge that they are defeating another's lien, and who intended to do so."

It will be seen that the statute construed in *Byers vs. Engles* use the express language that "actual notice" shall be equivalent to record notice. This statute was not adopted and put in force in the Indian Territory and does not affect this case any more than the decision construing it.

The defendants in error have also cited another recent case from Arkansas which they claim sustains their position, but which we claim, if it has any bearing on the case whatever, sustains ours. It is the case of *Steers vs. Kinsey, 58 S. W. Rep., 1050.*

The mortgage in this case was executed and recorded in October, 1889. On the 10th day of December, 1890, the attachment suits were begun. After that time and before judgment in the attachment suits, to-wit: on March 11, 1891, the State of

Arkansas passed an act validating the defects in the deed of 1889. The attachment was sustained March 29, 1892. Of course all this time the attachment was an inchoate lien, and prior to the time it was sustained liable to be defeated by a repeal of the law or the passage of any retroactive legislation. The court in fact lays down the further doctrine that we contend for in this language:

"The statute cured defects in the acknowledgment of the mortgage, and gave it, except as to persons having acquired vested rights in the land before the passage of the acts, the same force and effect it would have had had it been properly acknowledged in the first instance. The only question that remains, then, is whether the parties who brought the attachment suits acquired vested rights in the lands by the bringing of the suits and the levy upon the lands."

It will be seen that the point made is simply whether the institution and levy, not judgment, in the attachment case constituted a vested right. Had the attachments been sustained and the lien perfected prior to the passage of the curative statute, the court would certainly have rendered no such decision.

We have never made any allegations or reference in this case as to fraud other than that which the law absolutely infers from the production in evidence of a muniment of title, an unrecorded mortgage. We do not have to allege fraud of any kind. The statute under which we proceed doesn't require it. This proceeding was under sections 390 and 391 of *Mansfield's Digest of the Laws of Arkansas*. This statute requires that the party claiming the property shall make oath that it is his property and shall give a bond "that he will prosecute such interpleader of attachment without delay, and if on the trial of such interpleader the property shall be found to be the property of the defendant in such writ, and the plaintiff shall recover judgment against the defendant, the property shall be delivered to said sheriff," etc. The interpleader

filed its affidavit on the 12th day of December, 1896. The formal interplea was filed on the 27th day of January, 1897.

This interplea recites the levy of the attachment and raises the issue that the property was not subject to levy as the property of J. R. Blocker.

The answer to the interplea asserts the fact that it was the property of J. R. Blocker at the time of and liable to the levy. The controversy therefore was one as to who had the best lien on the property. If there had been no objection at all to the introduction of the written instrument when the plaintiff introduced the attachment proceedings against the defendants' deed, the plaintiffs were entitled to the peremptory instruction asked for at the close of the testimony and the lower court committed an error in not sustaining said motion.

Under the chattel mortgage act in force in the Indian Territory the recording of the mortgage is as essential to its validity as against third persons as any other element entering into the making of a valid chattel mortgage. It is a valid lien only from the time of its being filed for record even as against purchasers and creditors with actual notice. The registration of a mortgage under our law operates as constructive notice, only when the statute authorizes its registration and only to the extent of those provisions which are within the registration statute.

Blatchford vs. Boyden, 122 Ill., 657.
Parroski vs. Goldberg, 50 N. W., 191.
Waller vs. Rossman, 45 Mich., 333.
Sidener vs. Bible, 43 Indiana, 230.

We do not have to allege or prove fraud, because the case is settled when the priority of liens was settled, as under our statute

fraud is an absolute inference of law which cannot be rebutted or explained by evidence showing the transaction fair and honest.

II. Cobbey on Chattel Mortgages, sections 614 to 616.

Jewell vs. Simpson, 16 Pac. Rep., 450.

When one claims title under a mortgage and it shows on its face that it was not legally recorded, then the only way to rebut the inference of fraud is to show a change of possession, and the burden is on the party asserting title under a mortgage to show the changing of possession or some other fact if such there is to take the case out of the statute.

I. Cobbey on Chattel Mortgages, sections 497–574.

Blatchford vs. Boyden, Supra.

McCarthy vs. Grace, 23 Minn., 182.

Where the mortgage fixes the residence of the party, the location of the property, and who retains the possession it is conclusive unless particularly attacked or proven otherwise by the party claiming under it.

II. Cobbey on Chattel Mortgages, section 574.

It is contended by the defendant in error that because plaintiff was a non-resident of the state that the law did not apply to him and that he stood as though there was no law on the subject. But that is not true for the question has been passed upon several times and decided that where the mortgagor resides out of the state he must take possession of the property in order to make his mortgage valid. In addition to cases formerly cited, see:

II. Cobbey on Chattel Mortgages, section 578.

Dillingham vs. Bolt, 37 New York, 198.

On the question as to the distinction between creditors and purchasers in this kind of a case, in addition to the authorities

cited in our former brief we desire to call attention to *II Cobbey on Chattel Mortgages, section 606*. Much was said in the majority opinion of the Court of Appeals as well as in the brief of the defendant in error about the equities of this case, and it was urged that the fact that defendants' money had gone into these cattle should weigh greatly in deciding a case. We desire to answer that proposition by quoting from the case of *Blatchford vs. Boyden Supra*, a very able decision from the Supreme Court of Illinois:

"The fact that the mortgage is for the purchase money, or the intention of the parties that it is to be secured thereby, can give no vitality to the lien on the mortgage. As against third persons, creditors, or purchasers, a chattel mortgage lien can be preserved only in two ways: by the mortgagee retaining possession of the property, or by the recording of a properly executed and acknowledged chattel mortgage providing that the possession of the chattels shall remain with the mortgagor."

In none of the cases where such chattel mortgages have been attacked has fraud ever been alleged or its allegation required. The objection was simply made to the instrument because it did not comply with the statutory requirement and as against third persons no title ever passed through any such instrument. The issue in cases like this between the plaintiff and defendant and those arising on the interplea are in one sense distinct but they are not foreign to each other.

It must be admitted by anybody that the only question, as before stated, to be tried was the title to the property, and if no title passed by the defective mortgage, as it could not under our statutes, to the interpleader the plaintiff's perfected attachment lien was bound to prevail, because he had the higher title and the only title recognized by law.

Respectfully submitted,

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Brf. of Pollard for

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Filed Dec. 29, 1900.

IN THE

Supreme Court of the United States.

October Term, 1900.

W. P. H. McFADDEN et al., Plaintiffs in Error,

vs.

JOHN R. BLOCKER et al., Defendants; EVANS-SNIDER-BUEL CO., Interpleader, Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

H. M. POLLARD,
Counsel for Defendant in Error.

IN THE

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W. P. H. McFADDEN et al., Plaintiffs in Error,

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JOHN R. BLOCKER et al., Defendants; EVANS-SNIDER-BUEL CO., Interpleader, Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

STATEMENT.

In June, 1896, plaintiffs in error brought an attachment suit against defendants Blocker et al., in the United States Court for the Northern District of the Indian Territory, and levied upon some 7,000 head of cattle. Immediately thereafter defendant in error interpleaded in the case giving bond, and took possession and disposed of the cattle. Afterward and on January 29, 1897, a judgment was rendered by default against the defendants Blocker et al., for the amount claimed.

After the rendition of said judgment, and on, to wit: the 3d day of February, 1897, the Congress of the United States enacted and the President approved the following Act:

> "Be It Enacted, etc., that section 4742 of Mansfield's Digest of the laws of Arkansas heretofore put in force in the Indian Territory is hereby amended by adding to said section the following:
>
> "Provided, that if the mortgagor is a non-resident of the Indian Territory the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated.

The suit was based on a judgment against the defendants Blocker et al., which had been obtained in the District Court of Texas, more than nine years theretofore. The interplea of the plaintiff in error was as follows:

> "Comes now Evans-Snider-Buel Co., a corporation, organized under the laws of the State of Illinois, and represents that it is the owner and entitled to the possession of the following described cattle now in pastures near Summit, Indian Territory: 6775 head of cattle, of which 5140 are three and four year old steers and 1635 are cows. Said cattle are branded, as follows:
>
> (Describing brands.)
>
> "That said property has been levied on as the property of J. R. Blocker by virtue of an attachment issued in this case, dated June 17, 1896, wherein Wm. Fadden & Son are plaintiffs and James W. Taylor et al., are defendants, which cause is now pending in said court."

Said interplea was duly verified. There was an answer filed to said interplea which was in substance a general denial.

At the trial of the case made by the interplea the interpleader introduced four mortgages which are not necessary to set out here, because there is no controversy whatever concerning the same. Said mortgages were executed by defendant Blocker to the interpleader, several months before the bringing of the attachment therein, and covered the identical cattle attached. Said mortgages were executed in the State of Texas, of which state said Blocker was a citizen and resident, and were duly recorded in the county of which Blocker was a resident in said State of Texas, and were also immediately recorded in the judicial district in which the property was situated in the Indian Territory at the time the mortgage was executed; that at the time of the execution of the mortgage the cattle were in the Indian Territory, and that all the above-mentioned records of said mortgages had been made some months prior to the commencement of this attachment suit.

Interpleader also introduced the notes executed by said Blocker to it, evidencing the debt secured by said mortgages, which notes aggregated $132,000.00.

Interpleader further offered in evidence the writ of attachment above referred to and the return thereof. It was then stipulated by the parties, plaintiff and interpleader, that the property levied on is the same as that described in the mortgages introduced in evidence.

It was also agreed between the plaintiffs and interpleader that the plaintiffs had actual notice of the mortgages at the time the levy was made, and that they

had actual notice of the existence of the mortgages introduced in evidence, and which were recorded in the Northern District of the Indian Territory at the time of the levy of the writ of attachment, and that the mortgages were examined by counsel for plaintiffs in the attachment suit and that the description of the property was taken from the record thereof, before the attachment was issued.

Whereupon the interpleader proved by Amos T. Atwater, that he was secretary of the interpleader and its managing officer at the National Stock Yards, Illinois, that interpleader advanced $132,000 to said Blocker, which advance was evidenced by the notes put in evidence which were secured by said mortgages, which notes plaintiff then admitted evidenced the indebtedness of Blocker to interpleader which said mortgages were executed to secure.

Interpleader further proved by said Atwater that the very money which it advanced to said Blocker, and which was secured by said mortgages, was used by Blocker in the purchase of the cattle attached;

That said interpleader advanced all the money that went into the purchase of said cattle, and that defendant Blocker did not advance one dollar of it;

That at the time the attachment was levied in this case the whole of the interpleader's debt was unpaid and aggregated $132,000, and that the cattle attached were supposed to be worth about that sum, but when they were sold on the market they only yielded $100,000.

Interpleader proved by defendant John R. Blocker that he was the Blocker who executed the mortgages and notes read in evidence; that said mortgages were executed at San Antonio, Texas, and that he, Blocker,

was a citizen and resident of the State of Texas at the time of the execution of said mortgages and still is such, and that said cattle were in the Indian Territory at the time the mortgages were executed and in the Northern District and that they were the same cattle that were seized by the marshal in said attachment proceeding;

That the mortgages covered all the cattle he had in the Indian Territory, and that they were all attached, and that he did not put one dollar of his own money into the purchase of said cattle. Whereupon the interpleader rested.

Plaintiffs put in evidence the record of the judgment in the attachment suit which showed that the action was based on a judgment against said defendants Blocker et al. rendered in 1887. Plaintiff also put in the record sustaining the attachment of the same. Whereupon the court at the request of the interpleader, instructed the jury that they must return a verdict in favor of the interpleader, which was accordingly done. Whereupon, the following stipulation was made:

> "It is agreed by the attorneys for the intervener in open court that in case the judgment in this court shall be in favor of the interpleaders and against the plaintiffs, that if the court of appeals for the Indian Territory shall reverse said judgment that it may at the same time render judgment in favor of the plaintiffs for the amount of plaintiff's demands as shown by the judgment in this case, and for costs. This agreement is made with the understanding that it shall not operate to the prejudice of the interpleader in case it should desire to appeal from that judgment."

It was also agreed by counsel for plaintiffs that interpleader should not be prejudiced in its rights to appeal to any court that should have jurisdiction of such appeal.

There was a judgment for interpleader.

The plaintiffs filed their motion for a new trial, wherein they alleged as reasons therefor,

First. That the court erred in directing a verdict in favor of the interpleader.

Second: That the verdict of the jury is contrary to law.

Third. That the court erred in overruling the objections to the introduction of the mortgages and the statements of the witness Atwater that the money loaned and secured by the mortgages was the purchase money of the cattle levied on.

Which motion was overruled; whereupon the plaintiffs appealed to the United States Court of Appeals for the Indian Territory, in which court the judgment of the trial court was reversed, and in accordance with the stipulation above mentioned, judgment was rendered in favor of the plaintiffs and against the interpleader.

Interpleader then brought the case to the United States Circuit Court of Appeals for the Eighth Circuit, which latter court reversed the judgment of the U. S. Court of Appeals for the Indian Territory and affirmed the judgment of the trial court; from which judgment of the U. S. Circuit Court of Appeals plaintiffs in error bring the case here.

POINTS AND AUTHORITIES.

I.

Where a mortgage is executed by a citizen of one State covering property located in another State and there is no provision for recording such mortgage in the latter State, the rights of third persons either creditors or purchasers attacking such mortgage, must be determined by the common law, if that system is in force in the State where the property is situated.

Under the registry law contained in Mansfield's Digest, in force in the Indian Territory, when the mortgages in controversy herein were given and plaintiffs levied their attachment, there was no provision for recording a chattel mortgage given by a non-resident of the Indian Territory, and as the common law was in force in Arkansas, and likewise in the Indian Territory, the rights of the attaching creditors herein must be determined by the rules of the common law.

Under the common law, the mortgages in question were valid between the parties thereto without delivery of possession to the mortgagee as they were made in good faith to secure the money advanced to purchase the mortgaged property, and they are superior to a subsequent attachment of the same property by a creditor of the mortgagor with actual notice thereof.

Thompson Lumber Co. v. Watson, 49 Ark. 83.
Twynes Case, Smith's Leading Cases;
Stone v. Grubham, 2 Bulstrode;
Edwards v. Harben, 2 Term Rep. 587;
Kadogan v. Kennett, Cow. Rep. 432;
Kidd v. Rawlingson, 2 Bos. & Pul. 59;

Hamilton v. Russell, I Cranch 310;
U. S. v. Hooe, 3 Cranch, 89;
Hempstead v. Johnson, 18 Ark. 134;
Applethwaite v. Harrell & Co., 49 Ark. 281;
Bank of Black Rock v. Decker, 44 S. W. 220;
Sutherland on Stat. Con. secs. 138, 153, 287;
Ghio v. Byrne, 59 Ark. 292;
Cobbey on Chat. Mort. sec. 51;
Main v. Alexander, 9 Ark. 112;
Smith v. Moore, 11 N. H. 63;
Montgomery v. Wright, 8 Mich. 143;
Endlich on Interpretation of Stats. sec. 397;
Ferguson v. Edrington, 49 Ark. 241;
Union Nat. Bank v. Oium, 54 N. W. 1034;
Moore v. City, 42 Ark. 66;
Burton v. Sitlington, 128 Mo. 164.

II.

If the Recording Acts of Arkansas do not apply to non-resident chattel mortgagors they are in conflict with Sec. 2, Art. IV of the United States Constitution.

Cummings v. Missouri, 4 Wall. 321;
Ward v. Maryland, 12 Wall. 430;
Slaughter House Cases, 16 Wall. 119;
Corfield v. Coryell, 4 Wash, C. C. 471;
Crandall v. State, 10 Conn. 339;
Cooley on Con. Lim, 397;
Story on Constitution, sec. 1806;
Farmers' L. & T. Co. v. Chicago, etc., 27 Fed. Rep. 46;
Roby v Smith, 30 N. E. 1093;
Richie v People, 154 Ill. 98;
Third Nat. Bank v. Devine, 34 L. R. A. 446;
Holden v. Hardy, 169 U. S. 366;
Munn v. Illinois, 94 U. S. 145.

III.

The Act of Congress of February 3rd, 1897, is not in derogation of the fifth amendment of the constitution and is retroactive and it made interpleader's mortgages just as effective as if that Act had been in force at the time of their execution.

Watson v. Mercer, 8 Pet. 88;
Satterlee v. Matthewson, 2 Pet. 380;
Steampship Co. v. Goliff, 2 Wall. 450;
Cooley on Con. Lim. 464;
Drake on Attachment, sec. 228;
Johnson v. Richardson, 44 Ark. 365;
Hannah v. Felt, 15 Iowa, 143;
Story on Constitution, sec. 1957;
3 Parsons on Contracts, 552;
Green v. Abram, 43 Ark. 420;
Reid v. Hark, 45 Ark. 41;
Newton v. Tebbets, 7 Ark. 150;
Cupp v. Welsh, 50 Ark. 294;
Sidway v. Lawson, 58 Ark. 117;
Sannoner v. Jacobson, 47 Ark. 40;
Shinn on Attachments, secs. 440, 429;
Huiscamp v. Moline & Co., 121 U. S. 971;
Atkins v. Swope, 36 Ark. 537;
Tenant v. Walker, 58 Ark. 255;
And the authorities cited by the U. S. Cir. Ct. of Appeals in the opinion rendered by it herein.

ARGUMENT.

I.

On December 6, 1837, the Legislature of Arkansas enacted a law which is substantially the statute of Eliz. Ch. 5, which is found in Mansfield's Digest, sections 3374, 3375, which provide that every conveyance or assignment of any estate in goods and chattels made with intent to hinder, delay or defraud creditors shall be void, but no such conveyance shall be deemed void in favor of an innocent subsequent purchaser if the deed or conveyance shall have been recorded, or the purchaser have actual notice thereof.

On December 9, 1837, the legislature adopted the common law. Mansfield's Digest, chapter 20, section 566. On February 20, 1838 the legislature passed the law requiring mortgages to be recorded. Mansfield's Digest, 4742, 4743, which sections are in the identical words of the act as originally passed.

These statutes were all passed during the same session. Did the recording statute, passed February 20, repeal sections 3374, 3375, and did it abrogate the law of mortgages at common law, and the law of actual notice, which was the best notice up to February 20, 1838.

We admit that the law of actual notice was repealed as to resident mortgagors, for whom another notice was provided and required by the statute, but our contention is that it was not repealed as to non-resident mortgagors; but that the statute of frauds which makes actual notice as good as record notice controls in such cases. Sutherland on Statutory Construction, sec. 333, says:

"It is presumed that the legislature is acquainted with the law; that it has a knowledge of the state of it upon the subjects upon which it legislates; that it is informed of previous legislation."

In Section 440, he says:

"Such statutes as take away a common law right, remove or add to common law disabilities or provide for proceedings unknown or contrary to that law are construed strictly. The courts can not properly give force to them beyond what is expressed by their words or is necessarily implied from what is expressed. Statutes are not to be construed as taking away a common law right unless the intention is manifest."

Under this rule of interpretation let us see what is expressed and what necessarily implied in sections 4742, 4743. It is expressly provided that chattel mortgages shall be recorded in the county in which the mortgagor resides, which mortgage shall be a lien from the time it is filed for record and not before, which filing shall be notice to all persons of the existence of such mortgage. It is expressed that only resident mortgagors can record; that there can be no lien without record, and that record shall be notice to all persons; and as sometimes construed by the Arkansas Supreme Court, it is the only notice that will avail; that actual notice is insufficient.

Blocker, when he gave the mortgages to interpleader, was a resident of Texas, and for that reason the mortgages could not be recorded in the Indian Territory, nor could said mortgages be a lien under the statute, because it expressly says, such mortgage shall be a lien from the time the same is filed in the court where the mortgagor resides, *and not before*. Nor under said statute could interpleader give record notice of its claims.

Interpleader could do nothing under the statute to protect his claim against Blocker's creditors, and as non-resident mortgagors are not named and as nothing is directed to be done with mortgages made by non-resident mortgagors, and the statute puts compliance out of the power of interpleader, by no rule of construction can the statute be held to determine the rights of interpleader.

The law does not require impossibilities. It must be reasonable. It requires obedience of those who can obey. Our contention is that the statute has no application to mortgages given by non-resident mortgagors, otherwise the statute should read as follows: Chattel mortgages must be recorded in the county of the residence of the mortgagor, and they shall be liens from the time of filing for record and not before, and such record shall be the only notice of the existence of said mortgages, and the provisions of this statute shall equally apply to mortgages by resident and non-resident mortgagors. How would the courts construe such a law? Would not any intelligent court hold the law valid as to resident mortgagors and invalid as to non-resident mortgagors?

What was the intention of the legislature? Evidently to require mortgages to be recorded. But if that was the object it could not have been the intention that mortgages given by non-residents should be recorded or there would have been a provision, as in the case in most states, and in Arkansas and the Indian Territory, now, requiring such mortgages to be recorded in the county where the mortgaged property was situated. But as there is nothing expressed in the statute about non-resident mortgagors and as it, by its terms necessarily excludes them from its provisions, the reasonable inference, as well as the construction under the rule

given by Sutherland, is that it was not intended to affect in any way mortgages given by them, but to abrogate the common law only as to resident mortgagors, and only to the extent expressed. If the object of the statute was to give notice by record, and record was the best and only notice allowed, why did not the legislature provide for record where property was located in case of mortgages by non-residents? Why say that notice of mortgages by residents must be by record, but as to non-residents it must be by mortgagee taking possession. Is there any reason for such a distinction? No. Nor has the statute made any such. It has no application to mortgages by non-residents.

On the non-applicability of the statute, we refer to Maxwell vs. Collins, 8 Ind. 38, cited in Suth. Stat. Con., section 429. In this case the statute provided that no person shall be sued before a justice of the peace except in the township where he, the defendant, resides. The court held that it did not apply to non-resident defendants. See also Wheeler vs. McCormick, 8 Blatchford, 267. The case of Atkins vs. Borstler, 46 Mich. 552, 9 N. W. Rep. 850, was a decision by the Supreme Court of Michigan on a statute which required all transitory actions to be brought in the county where one of the parties resided at the time of the commencement of the suit. The court held that it did not apply to non-residents, and in passing upon the contention of defendant that as neither party resided in Kent county he could not be sued there, said, if the statute in question could have any such effect according to its ordinary meaning we are compelled to choose between holding it to that extent *void*, or construing it according to what no doubt was its real intent, as not applicable here.

The same may properly be said about the Arkansas statute. If it deprives Blocker of the use of his prop-

erty on his giving a mortgage on it, without giving him any opportunity to record it, it is to that extent *void*; but if it is construed according to what no doubt was its real intent, it will be held as not applicable.

If we are correct as to its inapplicability, then all the Arkansas decisions construing it are inapplicable, and the court will notice that *all the cases where it is construed the mortgagor was a resident and could have complied with the law*, except Thompson Lumber Co. v. Watson, 49 Ark. 83, which will be noticed later.

But plaintiff's counsel maintain that the statute is applicable to both residents and non-residents. Speaking of a resident they say he was denied the right to record a mortgage in any other county than that of his residence. "He (the resident) then when he got a mortgage on property outside of his county, had to take possession of it *as he would have done before the recording act was passed*" That is a statement that a change of possession was required, before the recording act was passed. That is, that the law requiring a change did not originate with the statute, but was the law before it, or was required by the common law. They (non-resident mortgagors) simply had to take possession of the property instead of being able to record their mortgages. Of course they mean mortgagees holding mortgages given by non-residents. The purport of these statements is that mortgagees had to take possession before the recording act was passed, that is, that the common law required it. They say the recording act also requires it. Then to that extent it is declaratory of the common law, according to that theory. To support these propositions counsel cite no decision, no express statement in the statute nor implication necessary or otherwise.

Was a change of possession required at common law? We call attention to the case of Twyne, found in Smith's Leading Cases and fully annotated. This case was tried in 1601 and is the first great case on the subject of the presumption of fraud arising from possession after an *absolute* transfer. In that case, one Pierce was indebted to Twyne in the sum of £400 and to C. in the sum of £200. C. brought suit. Thereupon Pierce made a conveyance in secret transferring all his goods without exception to Twyne and remained in possession using and trafficking with them, shearing the sheep and marking them in his mark. After C. got judgment, execution was issued and Twyne and his friends resisted the officer who came to levy. Whereupon Coke, Queen's Attorney-General, made information against Twyne for making and publishing a fraudulent gift of goods. On the trial the question was, whether this gift (referring to the deed or transfer) was on the whole matter, fraudulent and of no effect by the Act of 13 Eliz. or not. On the trial it was resolved that this gift had the following signs and marks of fraud, namely: first, the gift was general without exception of his apparel or anything of necessity; second, the donor continued in possession and used them as his own, and by reason thereof he traded and trafficked with others and defrauded and deceived them; third, it was made in secret; fourth, it was made pending the writ; fifth, here was a trust between the parties for the donor possessed all and used them as his proper goods, and fraud is always appareled and clad with a trust and the trust is the cover of fraud; sixth, the deed contained that the gift was made honestly and truly and *bona fide*, and unusual expressions always excite suspicion.

In this case, it is said that the gift had the signs and marks of fraud. Not that it was *per se* fraudulent, but that it had six badges or marks indicating fraud, one of which was that Pierce, after making the absolute gift in payment of his debt, remained in possession and used the property he had transferred as his own and traded with it and sheared the sheep and marked them in his mark. Possession was only *one* among six marks indicating fraud. Now if these six badges of fraud were the special findings of a jury, our courts would hold the gift fraudulent. The Blocker mortgages have not a single one of these badges of fraud, and right here let us say that unless they are fraudulent *per se* and admit of no explanation interpleader must recover for plaintiffs admit that in this case there are no badges of fraud, nor fraud, and that the mortgages were made in good faith to secure an honest debt.

The next case in order is Stone vs. Grubham, 2 Bulstrode, a synopsis of which is found in section 18, Pierce on Fraudulent Mortgage of Merchandise. In this case Lord Coke and his associates held that an *absolute* conveyance of a lease for years unaccompanied by possession was fraudulent, but if the deed of conveyance be *conditional* there, the vendors remaining in possession does not avoid it, because by the terms of the conveyance the vendor is not to have possession until he has performed the condition.

The leading case on this subject, and one that has sometimes been misunderstood, is Edward vs. Harben, reported in 2 Term Report, 587. In this case Tempest Mercer was indebted to Harben in the sum of £191, and to Edwards in £22. Mercer offered to Harben a bill of sale of his goods, household furniture and stock in

trade. Harben refused to accept it unless he should be allowed to enter upon the effects and sell them after fourteen days, to which Mercer agreed, and an *absolute bill of sale* executed, and Mercer left in possession. Before the fourteen days expired Mercer died and Harben entered and took possession. Edwards brought suit against Harben as executor *de son tort*, and the question to be decided by the court was whether the bill of sale was void as against the creditors of Mercer or not. Justice Buller, in delivering the opinion, among other things, said:

> "So long ago as in the case of Bulstrode (Stone vs. Grubham) the court held that an *absolute conveyance* or gift of a lease for years, unattended with possession, was fraudulent, but if the deed of conveyance be conditional, then the vendors continuing in possession does not avoid it; because by the terms of the conveyance the vendor is not to have possession till he has performed the condition. Now, here the bill of sale was on the face of it *absolute* and to take place *immediately*, and the possession was not delivered, and that case makes the distinction between deeds or bills of sale which are to take place immediately and those which are to take place at some future time. For in the latter case the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed, and such possession comes within the rule as accompanying and following the deed. That case has been universally followed since."

Further on Judge Buller, says:

> "This has been argued by the defendant's counsel as a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law. That is the point we

> have considered, and we are all of opinion that if there is nothing but the *absolute* conveyance without the possession, that in point of *law* is fraudulent. On the other hand, there are cases where the vendor has continued in possession and the bill of sale has not been adjudged fraudulent if the want of immediate possession be consistent with the deed. Such was the case of Kadogan vs. Kennett, Cowper, 432, because there the possession followed the deed. So also the case of Haslington vs. Gill."

This last case was decided by Judge Buller three years before Edwards vs. Harben. In that case Justice Buller said:

> "Possession alone is not evidence of fraud, but that the transaction must be shown to be fraudulent from other circumstances."
> May on Fraudulent Conveyances, p. 121.

In Latimer vs. Batson, 4 Barnwell and Cresswell Eng. Com. Law Rep.) Abbott, C. J. (afterwards Lord Tenterden), said:

> "The question of possession is one of much importance, but that is with a view to ascertain the good or bad faith of the transaction," May, Fraud. Con. 119. In Arundell vs. Phipps, 10 Vesey, 139, 145, Lord Eldon said that "the mere circumstance of the possession of chattels, however familiar it might be to say that it proves fraud, amounts to no more than that it is *prima facie* evidence of property in the man possessing, until a title not fraudulent is shown under which that possession has followed. That every case from Twyne's case downwards supports that."

Kadogan vs. Kennett was decided by Lord Mansfield in which he says:

> "There are many things which are considered as circumstances of fraud. The statute says not a word about possession. But the law says if after a sale of goods the vendor continue in possession and appear as the visible owner it is *evidence* of fraud," and in summing up he says: "The question therefore in every case is whether the act done was a *bona fide* transaction or whether it is a trick and contrivance to defeat creditors." The transaction was sustained in that case because, as Judge Buller said there, "the possession followed the deed."

In Meggott vs. Mills, 1 Lord Raymond, 286, a bill of sale was made as security for money advanced by the mortgagee to purchase the household furniture of an inn, the mortgagor remaining in possession. The conveyance was assigned, Lord Holt saying:

> "If these goods had been assigned to any other creditor than Wilson (the man who furnished the money) the keeping possession of them had made the bill of sale fraudulent as to other creditors. But since the original agreement was thus, and that honestly and really made for securing the money of the defendant Mills, which he had lent to Wilson for this purpose, the agreements was good and honest."

In Kidd vs. Rawlingson, 2 Bos. and Pul. 59, the case was this: The plaintiff advanced money to one Auburn with which to purchase furniture and took a bill of sale as security, but left Auburn in possession. Lord Eldon upheld the conveyance and said:

> "It appears to me that this case does not fall within the principle of Twyne's case and the other cases on the subject."

He also cites with approval Buller's synopsis of Twyne's case, which Justice Buller concludes as follows:

> "But yet the donor continuing in possession is not in all cases a mark of fraud, as where the donee lends his money to buy goods and at the same time takes a bill of sale of them for securing the money." Buller's *Nisi Prius*, 4 Ed., 1785.

In Hoffman vs. Pitt, Lord Ellenborough said:

> "The not taking possession was in some measure indicative of fraud, but was not conclusive."

May, after reviewing the English authorities on this subject, says on page 123:

> "The result of the authorities appears to establish, that where in strict pursuance of the terms of the agreement or deed actual possession is not given, such want of possession is not *even* an evidence of fraud."

In Bissell vs. Hopkins, 3 Cowan, Judge Cowan reviews in a note most of the English authorities. Any number of cases could be cited, but we deem it useless, but commend to the court, Jones on Chattel Mortgages, chapter 8, sections 309-332.

This question has been passed upon by this Court. In Hamilton vs. Russell, 1 Cranch 310, Chief Justice Marshall says:

> "Modern decisions have taken this question up on principle and have determined that an unconditional sale, where the possession does not accompany and follow the deed, is with respect to creditors on the sound construction of the Statute of Elizabeth a fraud, and should so be determined by the court. The distinction they have taken is between a deed purporting on its face to be *absolute*, so that the separation of the possession from the title is incompatible with the deed itself, and a deed made upon condition which does not entitle the vendee to immediate possession."

He then quotes with approval the doctrine and distinction given by Judge Buller in Edwards vs. Harben. In the case of the United States vs. Hooe, 3 Cranch, p. 89, Marshall, J., says:

> "In the case of Hamilton vs. Russell this court declared an *absolute bill of sale* of a personal chattel of which the vendor retained the possession to be a fraud. But the difference is a marked one between a conveyance which purports to be absolute and a conveyance which from its terms is to leave the possession in vendor. *If in the latter case the retaining of possession was evidence of fraud no mortgage could be valid*, the possession universally remains with the grantor until the creditor becomes entitled to his money and either choses or is compelled to exert his right."

In Conrad v. The Atlantic Ins. Co., 1 Peters 386, Judge Story says:

> "But in cases where the sale is not absolute but conditional, the want of possession if consistent with the stipulation of the parties, and *fortiori* if flowing directly from them has *never* been held *per se* a badge of fraud. The books are full of cases on this subject."

Thus stands the law in this court; except the doctrine that possession after an absolute sale is fraud *per se*, has been modified and the question of fraud is left with the jury. Warner vs. Norton, 20 Howard 448.

The doctrine in Arkansas is best stated in Hemstead vs. Johnson, 18 Ark. 134. Judge English says:

> "This case (Twyne's) is a leading case on the subject of the effect of the vendor's continuing in possession after an absolute sale of goods. It has been followed in numerous cases both in the courts of England and of this country. But a controversy has prevailed in the decisions as to whether

the vendor retaining possession in such a case is to be considered as only a badge or evidence of fraud to be submitted to the jury under the direction of the court, and subject to be rebutted by counter testimony, or whether it is to be regarded as such a circumstance *per se*, as makes the transaction fraudulent in law. This court has adopted the rule that possession by the vendor subsequent to the sale does not amount to fraud *per se*, but is merely *prima facie* evidence of fraud subject to be explained. *But this rule does not apply to mortgages and deeds of trust where the grantor by the terms of the deed is permitted to retain possession of the property until default of payment, because in such transfers the possession is consistent with the deed and furnishes no evidence of fraud.*" This case has since been followed every time the question has been raised.

The Blocker mortgages provided that Blocker should keep possession of the cattle and feed them, and not remove them until three days before the maturing of the notes when he was to ship them to interpleader to be sold and the proceeds appropriated on the debt. This possession was consistent with the mortgage and followed directly from it. The eminent authorities referred to, hold that in such a case it was not necessary for interpleader to take possession to protect their claim.

The Supreme Court of Arkansas has never had a case before it where it was called on to decide the question, whether, as a non-resident mortgagor could not record, and thus give record notice, he might not give actual notice, and in the event he could not give record notice, and actual notice was insufficient, he would be compelled to deliver possession to the mortgagee. These are the very questions in this case. Where is the statute or decision that says that actual notice of a mort-

gage given by a non-resident mortgagor is sufficient. *The Thompson Lumber Company case does not touch the question of actual notice. It does not touch upon the effect of possession being retained by the mortgagor.*

Before examining critically the case of Thompson Lumber Company, we quote from Boyd vs. Alabama, 94 U. S. 648, as follows:

> "Courts seldom undertake in any case to pass upon the validity of legislation where the question is not made by the parties; their habit is to meet questions of that kind when they are raised, but not to anticipate them. The fact that acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity when the question is presented."

In Thompson Lumber Company case there is only one question submitted and one decided, and that was, was the foreign mortgagor corporation a resident of Arkansas, and in Clay county, where it was engaged in business and where the mortgage was recorded? If it was, the mortgage was good under sections 4742 and 4743 Mansfield's Digest. If it was not, the record in Clay county did not make good, because the statute 4742 and 4743 which was the one which the court was considering, required the mortgage to be recorded in the county of the residence of the mortgagor. On the question of residence alone, did counsel cite authorities in his brief. The whole argument of the court was to establish the proposition that a foreign corporation could not have a residence outside of the state that created it. The court after establishing this proposition says:

> "The Thompson Lumber Company *then was not a resident of this state.* We *therefore* conclude that the mortgage sued on was not valid against creditors who sued out execution, etc."

It does not say that in such cases in the absence of record notice actual notice might have been given, but was not, nor that remaining in possession made the mortgage fraudulent *per se*, for these points were not raised. Nor does it appear whether or not the possession was provided for in the deed and followed it. It seems that counsel and court seemed to think that there was but one question, viz.: that of residence and proper record in the case, and that upon the determination of that, judgment should go the one way or the other.

If the statute has the effect claimed for it by plaintiffs it deprives non-resident mortgagors of the valuable right of the use of their property, after mortgaging it, without due process of law, and is in violation of article 4, section 2, Constitution of the United States. The court will notice there is no alternative given in the statute. It simply says record, or suffer the consequences. If it is intended to apply to non-residents it requires of them an impossibility, and is therefore as to them void. In the case of Dells vs. Kennedy, 49 Wis. 555, decided by the Supreme Court of Wisconsin, June, 1880 it is held that,

> "A statute which without regard to its possibility or impossibility in any case, requires as a prerequisite to the exercise of the right to vote, the previous registration of the elector is unconstitutional."

In the body of the opinion the court says:

> "This law undertakes to do what no law can do, and that is to deprive a person of an *absolute right*, without his *laches*, *default*, *negligence* or *consent*, and in order to enjoy it to require of him an *impossibility*."

It is claimed that there are some Arkansas decisions which indicate that in the absence of record possession by mortgagee would have the same effect. In Applethwaite vs. Harrell Mill Company, 49 Ark. 281, Chief Justice Cockrill, after stating that the mortgage was never recorded (the mortgagor was a resident and could have recorded), says:

> "It was a valid security between the parties nevertheless, and after conditions broken between them became a legal title, and when the mortgagees took possession of the mortgaged property by virtue of it they had the same right to hold it against the subsequent attachment of appellees that any preferred creditor has to retain the property of his debtor that has been delivered to him in pledge or payment. Taking possession by the mortgagees by virtue of the mortgage was an appropriation by them of the mortgaged property to the mortgage debt, with the debtor's consent, and their *title* was good against subsequently acquired rights."

Has it occurred to plaintiffs' counsel that this is very old law, that it had been the law for at least five centuries before the recording statute relied on was passed? The court does not connect this possession with the statute. It does not state that possession perfects the *lien* in the absence of record. It does not say that it gives the world *notice* that mortgagees have an interest in the property, nothing of the sort; but simply states an old common law principle, that a mortgagee who has possession of property has the same right to hold it as a *pledgee* would have.

There is no Arkansas decision rendered prior to the adoption of the recording statute that holds otherwise. But there is a case recently rendered by the Arkansas Supreme Court to which I wish to call attention. I

refer to the case of the Bank of Black Rock vs. Decker, 44 S. W. 220. The mortgage in this case was by a resident, and could have been recorded, and, therefore, it was controlled by sections 4742 and 4743, and not by the common law. The court evidently inadvertently used the expression that "the bank did not have such possession as to supply the place of record notice to third parties," for it is in the very teeth of all the Arkansas decisions from Main v. Alexander down, which decisions hold that record notice is the only notice that will avail, and that actual notice is not sufficient, but if the court had said that possession in the bank would have enabled it to hold the property against all subsequent claims, as is said in Applethwaite vs. Harrell Mill Company, there would be harmony in the decisions. In this case the court calls attention to the fact that Decker, the purchaser of the lumber on which the bank had a mortgage, had no notice of the bank's claim. Now when this statute was first construed the supreme court decided that record notice alone filled the requirements of the statute, which is not an unreasonable construction when we notice that the statute requires record in order to have a lien, so as there could be no lien without record, record was found to be the only notice of the existence of a lien, and if a mortgage could not become a lien without record and was not recorded, no amount of actual notice of the existence of the mortgage would do any good, and that is also the reason why the holders of a mortgage given by a resident mortgagor who failed to record when he could have done so, as required by the statute, could only save himself by taking possession. By taking possession he could hold it against all subsequent claims, not by virtue of a lien, for he would have none, but under the

principles named in Applethwaite vs. Harrel Mill Company, which are as old as the common law.

Now if it were possible to have a lien without record, in any case, it would not be necessary to give notice of it by record, for instance in the case of a mortgage given by a non-resident mortgagor. In that case the statute expressly prohibits record, and there is no way under the statute to get a lien except by record; and if the statute is applicable in such cases, it repeals or abrogates the common law which allowed a mortgagor to fix a lien on his property by written mortgage, without record, for there was no registration at common law. We admit the common law was abrogated as to mortgages given by resident mortgagors, for such might be recorded, and a lien created. It is no reply to say that holders of mortgages given by non-resident mortgagors could take possession. The proposition which we are contending for is, that if the statute which denies the right to create a lien by record *compels* such mortgagees to take *possession*, which does not create a lien, then it prohibits non-residents from *encumbering* their property in this territory, and if the legislature can prohibit the encumbering of property, it can prohibit the transfer and sale of it, and by the same power deprive the owner of his property by an act of the legislature. Every citizen has the right to own, use, encumber and transfer property. He has an equal right to each. Who will be so reckless as to seriously say that the statute 4742 and 4743 abrogated the common law as to mortgages except as to resident mortgagors, and repealed sections 3374 and 3375 passed at the same term and compelled creditors to resort to the law of pledges to secure their debts on the property of non-residents situated in the Indian Territory?

The statute of frauds (being sections 3374 and 3375) has been continued in the compilations of Arkansas statutes ever since December 6, 1837. It may be that it is repealed as to chattel mortgages *which may be recorded*, but certainly no further.

Can the mortgage statutes be harmonized with the statute of frauds and the common law? If not, what is the extent of the conflict, and how much of the statute of frauds and the common law on the subject of mortgage liens can stand?

Suth. Stat. Con., section 138, says:

> "Subsequent legislation repeals previous inconsistent legislation whether it expressly declares such repeal or not. The intention to repeal, however, will not be presumed, nor the effect of the repeal admitted, unless the inconsistency is unavoidable, and only to the extent of the repugnance."

In section 153, he says:

> "The presumption is stronger against implied repeals where provisions supposed to conflict are in the same act *or were passed at nearly the same time.*"

In section 287, he further says:

> "The legislature are presumed to know existing statutes, and the state of the law relating to the subject with which they deal; hence that they would *expressly abrogate* any prior statutes which are intended to be repealed by new legislation."

The legislature of Arkansnas is presumed to have known of the common law and sections 3374 and 3375 Mansfield's Digest, i. e. the Statute of Frauds, which were the laws governing the rights of mortgagor, mortgagee and the creditors of mortgagor, which had just been adopted and passed, and which were the only

law on the subject until the law requiring mortgages to be recorded was passed on February 20, 1838. This recording act expressly repeals the common law and 3374 and 3375 as to liens and notice as to mortgages given *by resident mortgagors*, but no further. Sections 4742 and 4743 do not cover *all mortgages* but only those given by resident mortgagors; as to these they direct how a lien may be obtained and what shall be notice of that lien, but they do not in express terms or by implication abrogate the law of mortgage liens at common law, nor the law of actual notice except to the extent aforesaid.

If the legislature under the rule of construction just given had intended to repeal the common law of liens and 3374 and 3375 as to *intent* and *actual notice as to all chattel mortgages*, they would have said so in express terms, and would also have made provision for all mortgages to become liens and a way to give notice thereof or have stated what should be done in such a case.

It is a maxim that the reason of the law ceasing, the law ceases. The reason why record notice is the only notice under the Recording Act, is that there is no lien without record, which reason does not apply in any case where there is a lien (as at common law) without record, for giving notice of a mortgage not recorded is worth no more than giving notice of an indebtedness by promissory note, which would be notice of a debt without a lien. Hence the reason of the law, not applying to other liens than those which are created by record, ceases, and the law ceases, or rather does not extend to such liens, as are created by contract.

In all cases of the sale and transfer of property, real or personal, in Arkansas in which the transfer is per-

mitted or requested to be recorded, either record notice or actual notice is sufficient. See Section 671 Mansfield's Digest construed in Byers vs. Engles, 16 Ark., 543. In speaking of registration as notice (not as creating a lien) the Supreme Court of Arkansas in Ghio vs. Byrne, 59 Ark., p. 292 says:

> "The act of registration is for the benefit of persons in the situation of appellant, in this: that it furnishes them notice of the existence of prior inconsistent claims to their own. In this case had there been no registration, and nothing in lieu thereof, still the appellant was affected with notice otherwsie of this mortgage, and that is all the benefit that registration could have afforded him."

This gives the object of registration and it is of universal application except as to liens created by record, of which nothing but a record was evidence and notice of the lien.

For these reasons we conclude that sections 4742, 4743 and the common law and sections 3374, 3375 being *in pari materia* as to liens and notice can be harmonized and all stand, by considering the common law and sections 3374, 3375, no further abrogated and repealed than to require mortgages given by *resident mortgagors* to be recorded in order to be a lien, and to make the record which created the lien, the only evidence and notice of its creation and existence.

This is a case of first impression. No case has ever been before this court or the Supreme Court of Arkansas in which all the points involved in this case were raised or passed on, nor has each or any of the points raised in this case been raised and passed on in any case or cases. There is no precedent to bind this court.

This court is for the first time called upon to decide whether or not there can be a mortgage lien given

by a non-resident mortgagor since the adoption of sections 4742, 4743. This is the first time the court has been called on to decide whether a mortgage lien *can under any circumstances* be created *by contract without record*, and whether actual notice of such a lien, if there can be one, is sufficient to prevent plaintiff from gaining priority by levy.

In this case good faith has characterized all the transactions between Blocker and interpleader, and plaintiffs admit that they had actual notice of interpleader's mortgage before they brought suit. Plaintiffs were not misled by Blocker's possession nor damaged thereby. Their debt was many years older than interpleader's and credit was not extended to Blocker by plaintiffs on the strength of said possession.

Take another view of this question.

The original object of the recording act was to give publicity and notice to conveyances of real estate in oreder to prevent fraud and secret trusts, and the same objects furnished the reason for the statute providing for the recording of chattel mortgages. The same may be said of the Statute of Frauds and Fraudulent Conveyances.

By the statutes of nearly all the states it is provided that where a mortgage is not followed by an *actual and continued change of possession*, it must be recorded; otherwise it is void as to creditors purchasers, etc. (20 Ency. Law, 537, and authorities there cited; 1 Cobbey on Chattel Mortgages, 494.) The general statement contained in the words on mortgages and in the Supreme Court decisions, that *possession* of the mortgaged property by the mortgagee takes the place of, or is equivalent to,

registration of a chattel mortgage, arises from the language of the statutes themselves and not from any common law doctrine that a mortgage to be valid must be followed by possession.

It would serve no good purpose to review all of these decisions which are cited by the text writers in support of this general proposition. We assert that an examination of the numerous cases upon this subject will show the statement above made to be correct. Upon this subject Mr. Cobbey says, Vol. 1, sec. 511:

> "To meet the demands of business and trade, it seemed to be necessary to give to the owner of personal property some better way of using it as a guaranty for the faithful performance of a contract than by the old way of pledge. To meet this demand, the different states now provide that mortgages of some or all classes of chattels may be made, and to permit the mortgagor to remain in possession, provide for a record, which record shall impart notice to the world, and take the place of the actual notice which would be imparted by an actual and continued change of possession."

Thus it will be seen that the phrase "actual and continued change of possession" used in most of the statutes means that notice arising from possession is thereby made as conclusive under such statutes as the record of a mortgage.

Prima facie presumptive notice is, generally, by the several chattel mortgage acts, which in express terms make possession equivalent to recording, made *conclusive*, but not by the Statute of Arkansas.

Mansfield's Digest, section 4743, provides:

> "Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's

office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

Now, by these plain terms, no chattel mortgage can constitute a lien unless it is recorded. There is no provision of the statute which makes an exception in cases where there is an actual and continued change of possession, and unless the mortgage is recorded, the terms of this statute prohibits it from being a lien absolutely, as well between the parties as to third parties. But it has been held by the Supreme Court of Arkansas that this statute does not prohibit such lien as between the parties. This was first so held in the case of Main vs. Alexander, 9 Ark. 112, and the Supreme Court there say:

> "The language of the act, it must be conceded, is exceedingly broad and comprehensive, and if taken in a strictly literal sense, would doubtless warrant the construction contended for by the appellants. We can not conceive that the legislature ever entertained the idea of changing, or in any manner affecting, the nature of a mortgage as between the parties to the contract. The rights of the parties to a mortgage, whether acknowledged and recorded or not, are precisely the same as they were before the passage of the act referred to, and the only real difference consists in the fact that although actual notice may be shown, it will constitute no answer to the demands of strangers, and that nothing short of an actual filing for record will be recognized as such a notice as to affect his rights."

And thus, by construction, the Supreme Court of Arkansas engrafts into the chattel mortgage act the provisions "as against third parties." So that in the case of Watson vs. Thompson Lumber Co., 44 S. W. Rept. 63, the rule is stated to be:

> "That a mortgage is good between the parties thereto, though not acknowledged and recorded, but constitutes no lien upon the mortgaged property as against strangers unless it is acknowledged and recorded, even though they may have actual notice of its existence."

Later, in the case of the Bank of Black Rock vs. Decker, 44 S. W. Rep. 220, it was contended by the bank that possession had been delivered to it, and that thereby the necessity of record was obviated, and it was held that the evidence showed only constructive possession, which was held not sufficient. After reciting the facts, Reddick, J., speaking for the court said:

> "Under these circumstances, we are of the opinion that the bank did not have such possession of the lumber as to supply the place of record notice to third parties. The bank should either have recorded its mortgage and thus given notice of its lien, or it should have taken and retained actual possession of the lumber in order that subsequent purchasers might not be misled. * * * As the bank did not have possession of the lumber, and as its mortgage was not recorded until after the transfer to Decker, the mortgage did not affect him."

Citing Dodd vs. Parker, 40 Ark. 536; Martin vs. Ogden, 41 Ark. 186.

In Dodd vs. Parker, the Supreme Court said that:

> "It has been universally held in this State that an unrecorded mortgage, or one which has been improperly admitted to registration, constitutes no lien upon the mortgaged property as against a stranger, notwithstanding he may have actual knowledge of its existence."

Thus, it appears from the quotations above that the language of the Statute of Arkansas, and the language

used in Dodd vs. Parker, is further modified in Bank vs. Decker, so that the notice resulting from actual possession would be equivalent to that resulting from registration. Why is notice by record and notice by possession placed on a parallel? There is nothing in the words of the statute to authorize it, and so far as we have been able to ascertain, there is nothing in any other statute which authorizes it, unless effect be given to the statute of frauds, section 3375, Mansfield's Digest.

But whatever the reason may be, since the statute does not give any efficacy to a change of possession, it necessarily follows that if the notice flowing from the fact of possession in the mortgagee is engrafted on to the statute by construction, any other actual notice should likewise be engrafted on to the statute.

And Since the statute doesn't recognize it as equivalent to record, it follows that there can be no reason for holding that possession takes the place of the record of a chattel mortgage, except upon the doctrine that it imparts notice of the mortgagee's rights, independent of the statute. The actual notice flowing from the reading of the mortgage itself, stands upon as high a plane as that flowing from possession, in absence of statute to the contrary.

Therefore, in reason the engrafting onto the Arkansas Statute the doctrine that possession is equivalent to registration, engrafts the whole doctrine of actual notice. They must stand or fall together. The interpleader therefore in reason would have been in no better position had actual possession been taken.

But the statute prohibits the mortgage from becoming a lien at all, until it is recorded or filed for record in the county of the mortgagor's residence. Was it

ever intended by the legislature to require the doing of an impossible thing, and to attach a penalty, the deprivation of the right of contract, as a consequence of not doing that thing? Manifestly not. Now, the legislature did not in terms provide that non-residents could not record their mortgages, but simply failed, probably through inadvertence, to provide a place to record a chattel mortgage given by a non-resident. Can it be reasonably held that by this failure the legislature meant to prohibit a non-resident from exercising and having these rights of contract as they existed prior to the passage of the law providing for the registration of chattel mortgages? That is, did the legislature, by the failure to provide a place for registration for a non-resident owning property in this state, thereby denying him the benefits of notice flowing from the recording of a mortgage, intend also to deprive him of the right to give a mortgage and have the actual notice in a bona fide transaction as it would have existed at common law, when it would have been so easy to have so declared in express terms? To so hold is contrary to all of the cardinal principles of statutory construction, and leads as we conceive, to an absurdity, and so construes the law as to make it unconstitutional. In the case of the State of Arkansas vs. Smith, 40 Ark. 431, construing some other terms of the chattel mortgage law, the Supreme Court of that state, said:

> "Any construction should be discarded that would lead to absurd consequences."

In the case of Lau Ow Bew vs. U. S., 144 U. S. 47, Chief Justice Fuller, delivering the opinion of the court, says:

> "Nothing is better settled than that statutes should receive a sensible construction, such as will

effectuate the legislative intent, and if possible so as to avoid an absurd conclusion."

See also Harles vs. U. S., 88 Fed. Rep. 97.

Now, applying these cardinal rules of construction to the Statutes of Arkansas, it seems to us that the necessary conclusion to be drawn is that while the statute is effective as to mortgages of residents, *no provisions being made for recording a chattel mortgage given by a non-resident upon his property situated in that state, it cannot be extended by construction in absence of language to warrant it, to prohibit the exercise of that valuable right of contract as it had previously existed at common law, and therefore as to such mortgages the common law was left in force*, and if bona fide they would be valid as to all parties with notice though unrecorded.

So far as we have been able to observe, the Thompson Lumber case is the only case supporting the proposition that a non-resident is prohibited from making a chattel mortgage in the State of Arkansas, and that proceeds upon the idea that because the statute fails to provide for a place of record, it amounts to such a prohibition, and in support of this decision is cited Smith vs. Moore, 11 N. H. 63; Bither vs. Buswell, 51 Maine, 602; Cook vs. Hager, 3 Col. 386; Stewart v. Platt, 101 U. S. 731; Briggs vs. Leitelt, 41 Mich. 80; 1 N. W. Rep. 942, to which authorities the court of appeals for this territory on a former appeal of this case added Jones on Chattel Mortgages, 261; Cobbey on Chattel Mortgages, 578.

Quoting from the language of the section of Jones on Chattel Mortgages cited, the court said:

> "In case the mortgagor resides out of the state under a statute which provides for a recording of

> a mortgage at the mortgagor's place of residence, and does not provide for recording it in the place where the mortgaged property is situated, there can be no effectual record of the mortgage, and therefore the only effectual mode of making the mortgage is for the mortgagee to take and hold possession of the mortgaged property."

Now, in support of this proposition, Mr. Jones cites 11 N. H. 55. Mr. Cobbey, section 578, cites the same cases above referred to, as well as Montgomery vs. Wright, 8 Mich. 143.

That there can be no effectual record of the mortgage in cases where there is no provision for recording the same, there can be no doubt; but we assert that it is not competent for the legislature, if it chooses to do so, to enact a law prohibiting non-residents from making chattel mortgages on their property situated within the state, and therefore they should not be presumed by intendment to have done that which was beyond their power, and which they did not do by direct enactment. It may be said that the case of Watson vs. Thompson Lumber Company does not hold that non-residents can not make a mortgage. True it does not so hold, but it does hold, and correctly, that the legislature had not given to non-residents the right to record a mortgage, and thus procure the benefits of the notice flowing therefrom. We contend that the statute not having made any substitute for the notice which registration would give, and not having in terms prohibited a non-resident from giving a chattel mortgage, actual notice would be as effectual as it would have been at common law.

The question of actual notice was not raised in the case of Watson vs. Thompson Lumber Co., so far as the opinion shows but it lays down the rule that actual

notice did not take the place of record, citing a line of Arkansas cases, all of which being cases in which the mortgagor was a resident of the state, and could have complied with the law, have no application.

We maintain that the expression in the language quoted from Jones on Chattel Mortgages:

> "And therefore the only effectual mode of making the mortgage is for the mortgagee to take and hold possession of the property,"

if supported by the authorities cited is not applicable, but we do not think it is supported by the authorities.

In the case of Smith vs. Moore, 11 N. H. 63, the court say (p. 63):

> "By the provisions of that act no mortgage of personal property subsequently made is valid against any other persons than the parties to it, unless the possession of the property be delivered to and retained by the mortgagor, or unless the mortgage is recorded in the office of the clerk of the town where the mortgagor resides at the time of its execution."

Under this satute the conclusions as to its effect is stated (p. 64) as follows:

> "To protect the property against creditors where the mortgagor resides out of the state, the mortgagee must take and retain possession, UNLESS PERHAPS IN CASES OF ACTUAL NOTICE."

In the case of Montgomery vs. Wright, 8 Mich. 143, the policy of the law of that state is stated (p. 149) as follows:

> "This provision for filing or registration is not intended by any means to encourage or legalize the practice of making mortgages without change of possession. The statute now, as before, regards change of possession as the rule, and allows filing

to dispense with its necessity, because filing is public notice, but we can not suppose that either statute was designed, or can be properly construed, to dispense in any case with filing and change of possession also. If a chattel mortgage of property here is made by a non-resident, our law contains no provision for filing it. In such a case a change of possession is therefore essential and can not be dispensed with against creditors or purchasers."

Thus, it will be seen that by virtue of the statute that a change of possession is made necessary, and the language above quoted shows that registration was intended merely as a substitute for a change of possession, while under the Arkansas statute registration is provided for, except in case of non-residents, and nothing is said in regard to a change of possession, therefore registration is the rule in Arkansas, with no substitute whatever provided by statute; hence, the Michigan case can not be held to apply. And from the language quoted from the New Hampshire case, it will be seen that a change of possession was provided for as a substitute for registration, and in addition to that, in case of a non-resident, it is in effect held that actual notice would be sufficient. It will be noted that the mortgagor resided in Canada, so the constitutional question as to privileges and immunities could not arise.

It is apparent that the case cited in 3 Colorado is not applicable to the case at bar, for the reason that section 10 of the Chattel Mortgage Act of that state contains a saving clause as to the failure to record the mortgage when an adverse right to the property is acquired with *actual notice* of the existence of the mortgage.

The other cases cited in Watson vs. Thompson Lumber Company refer merely to the rule that actual notice can not take the place of a *record* or *change of possession* in cases where the statute makes the mortgage void without one or the other, and in none of the cases is there any statute similar to that of Arkansas, nor is the question discussed touching the constitutionality of a statute which would prohibit a non-resident from making a chattel mortgage. None of these cases can be considered as authority for holding that the rule *Expressio Unius est exclusio alterius*, can be properly applied to the construction of these statutes of Arkansas, so as to read into them a prohibition against a non-resident making a mortgage which shall constitute a lien.

Endlich on Interpretation of Statutes section 397, says:

> "The maximum in question (referring to that quoted) as applied to the construction of statutes, certainly can not mean that, where one thing is allowed or named, every other thing is forbidden or excluded." * * * *
>
> "And on the other hand, if there is such a rule, it is confessedly liable to so many restrictions and exceptions in its application as to be practically swept away. Indeed, the extreme caution necessary in its application is emphasized wherever it is recognized by writers." * * *
>
> "Indeed, the exceptions would more than swallow up the rule; for, under it, there could be no such thing as implication or liberal construction, nor could there be any cumulative remedies where a statute undertakes to give a remedy."

In a note on page 560 of the same work it is said:

> "The effect of this rule is practically that general legisation on a particular subject must give way to special legislation on the same."

We therefore, believe that this maxim can not be applied in this case, further than to hold that as the law of Arkansas provides for the record of a mortgage in the county of the residence of the mortgagor, it therefore excludes the idea that a mortgage given by a non-resident can be recorded at all. But resort to this maxim is not necessary for this conclusion, because the recording acts can alone be looked to to determine the place of record, and the absence of any statute as to the place is equivalent to a denial of the right to record. It seems to us wholly incorrect to say that this maxim can be applied so as to construe the Arkansas statute as a repeal of the common law as those mortgages which are not provided for at all in the statute, but which are in fact prohibited from being recorded, not by positive enactment, but because no place is provided for such registration. This conclusion is enforced by considering that to hold that the common law was repealed in so far as it applies to non-resident mortgages, and the right to mortgage given to residents, but prohibited to non-residents, would be in violation of the Constitution of the United States, granting equal privileges and immunities, and United States Revised Statutes, article 1977-1978, upon same subject.

We therefore conclude from what has been said, that it was not the intention of Congress, expressed or implied, when it adopted Mansfield's Digest upon the subject of mortgages, to repeal or modify the common law as to mortgages by non-residents—there was simply no legislation applicable thereto, nor was it intended to thereby provide that possession would take the place of registration.

The terms of the statute adopted, neither by implication or otherwise, so provide, unless construed in connection with the Statute of Frauds, in which case any other form of actual notice is as effectual as that flowing from possession.

It is contended by counsel for plaintiff that the case of Watson vs. Thompson Lumber Co., having been decided before the Arkansas Statute was adopted by congress, therefore congress adopted this statute with the construction there placed upon it. The rule upon the subject of the construction placed upon adopted statutes is correctly stated in the syllabus (which is made the law in Oklahoma) in the case of Smith vs. Baker, 49 Pacific Rept., 61, by the Supreme Court of Oklahoma, as follows:

> "Where the legislature of one state or jurisdiction adopts a statute in force in another jurisdiction, which has already received a construction in its courts, it is presumed to adopt the construction thus given; but, to sustain the presumption, such construction must have been placed thereon by the highest judicial tribunal authorized to pass upon the question, and such construction must have been so long established as to have been known, or so long that it reasonably might have been known, to the legislature adopting it."

See also Sanger vs. Flow, 1 C. C. A. 56; Willis vs. Eastern Trust Co., 169 U. S. 295.

We do not think that it had become the *known* and *settled* construction that the common law would not apply to a mortgage given by a non-resident person, so as to invoke a presumption depriving this court of the right to construe for itself the adopted Statutes of Arkansas upon this particular point as presented in this record.

See, to the same effect, Coullam vs. Doul, 133 U. S. 216. Also the case of Bowers vs. Smith, 111 Mo. 45, l. c. 52, where, the Supreme Court of Missouri, in interpreting a statute adopted from another state, said:

> "It must be remembered that its adoption here brings it into subrogation to the fundamental law of Missouri, and that prior decisions elsewhere construing enactments on the same general topic, can not properly be followed if inconsistent with that fundamental law."

Mr. Endlich, in his work on the interpretation of Statutes, p. 518, speaking upon this subject, says:

> "And it is manifest that the imported construction should prevail only in so far as it is in harmony with the spirit and policy of the general legislation of the home state, and should not, if the language of the act is fairly susceptible of another interpretation, be permitted to antagonize other laws in force in the latter, or to conflict with its settled practice. Nor, where the constitutional requirements of the adopting state are different from those of the originating one, would a construction by the courts of the latter comformable with its constitution, bind the courts of the former not similarly construed."

It seems to us that under these rules, it can not be considered that the case of Watson vs. Thompson Lumber Co., contains a construction of such a character as to be considered as a part of the enactment of congress, or as having been adopted by congress. The U. S. Revised Statutes provide:

> "Sec. 1977. All persons within the jurisdiction of the Unted States, shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to full and equal benefit of all laws and proceedings for the security of persons and property as is en-

joyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

"Sec. 1978. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

From these sections of the Revised Statutes of the United States, the policy of congress that the rights of all persons within the jurisdiction of the United States shall be equal under the laws with respect to property and contracts, is clearly manifested, and it certainly can not be contended that in adopting Mansfield's Digest upon the subject of chattel mortgages, as applied to the Indian Territory, congress thereby modified these important statutes. If the Supreme Court of Arkansas had placed a construction upon the adopted statute which would abridge the rights of a citizen under the Constitution of the United States, or under these statutes, manifestly such construction must yield to the policy of the laws of the United States, since it is the duty of the court to adopt such construction as will make the statutes consistent with the supreme law.

Grenada Co. vs. Brown, 112 U. S. 261.

Of course it does not follow from this argument that congress intended to confer the right of recording a chattel mortgage upon a non-resident of the Indian Territory, but *it does follow that since the chattel mortgage act does not, by its terms, prohibit a non-resident from making a chattel mortgage on his property situated in the Indian Territory, nor provide for the registration thereof, that Congress did not intend to de-*

prive citizens of the United States of the right to so contract, as that right existed at common law; nor to deprive them of the benefits flowing from actual notice, simply by referring the benefits of record notice to residents.

It must be observed that if the Arkansas Statutes are to be construed as prohibiting a non-resident from making a bona fide chattel mortgage which shall be valid at common law, he is deprived absolutely of the right to mortgage. It may be contended that where possession is taken, the mortgage becomes valid. This may be true, but under the Arkansas Statute it is not by virtue of it being a mortgage lien, for the statute declares that the mortgage shall not constitute a lien until it is recorded. If it becomes valid by possession it is because it becomes a *pledge* and would be treated as such.

Does not the construction contended for by the plaintiff in this case deprive a non-resident absolutely of the right to make a mortgage? If the mortgage becomes valid by possession in the mortgagee, it becomes a pledge, hence, must make a pledge or nothing, until condition broken, then if the mortgagee takes possession it places in him full title, provided there are no intervening rights.

Our conclusion therefore is: That Congress can not be held to have intended any such consequence. It is an absurdity, it is unreasonable, it is inequitable, it is contrary to the Constitution and Statutes of the United States, and the policy of Congress with reference to citizens of the United States, and where such construction of a statute, as is contended for by respondents, leads to such consequences as we have heretofore referred to, that construction will not be adopted unless

from the plain wording of the statute no other construction is possible, but the courts will adopt the construction agreeable to the rule announced in the case of Washington and Idaho Ry. Co. vs. Coeur d'Alene Ry. and Navigation Co., 160 U. S. 77, viz.:

> "When a court of law is construing an instrument, whether a public law or a private contract, it is legitimate, if two constructions are possible, to adopt that one which equity would favor."

It is contended by counsel for plaintiffs, that the Constitution of the United States does not in anywise limit congress in enacting legislation with reference to persons or property in the Indian Territory.

If this claim is conceded (though it is not conceded), still this position does not meet our contention that the legislature of Arkansas did not have the power to prohibit the right of contract by a non-resident, with respect to property situated in that state; and it does not meet our contention that the legislature of Arkansas did not purport to prohibit such a contract; and it does not meet our contention that previous to the adoption of the Arkansas statute there was not a *known settled* construction thereof whereby these laws were held to prohibit a non-resident person making a mortgage, as at common law, valid as to strangers having actual notice; and it does not meet our contention that if such construction had been placed upon these statutes it would not be binding because contrary to the policy of national legislation with respect to citizens of the United States; and it does not meet our contention that Congress, by Sections 1977 and 1978, U. S. R. S., extended the constitutional provisions so as to apply the equal protection of the laws to persons and property wherever situated; and it does not meet our contention that in adopting the Statutes of Arkansas, Congress in

no wise intended to repeal or modify these sections of the Statutes of the United States referred to; and it does not meet our contention that if the statute, as it existed in Arkansas, and as construed by their courts, rendered non-residents a "proscribed" class, and was therefore unconstitutional, that Congress could not be held to have intended to adopt such a construction.

The actual conditions in the Indian Territory, which were known to Congress at the time of the passage of the act putting in force the Statutes of Arkansas, must not be overlooked; that the cattle business was the chief industry of the Territory, and hundreds of thousands of cattle, in that Territory, owned by non-residents and grazing therein were, by the common custom and practice, articles of commerce and contract by mortgage and otherwise. This condition was well-known, and it is hard to believe that there should have been any *actual intention* on the part of Congress to grant to a resident of the Indian Territory the right to contract with reference to *their* cattle, which constituted the small proportion of property of this character in the Territory, and at the same time to prohibit non-residents from making similar contracts, just as effective for the purpose of commerce. The controversies with reference to the grazing of cattle of non-residents in the Indian Territory, at the time of the passage of the act referred to, was the subject of constant discussion by the Interior Department of the Government and the committees of Congress having under their control the consideration of Indian affairs. In view of all of which, and looking to the conditions of that Territory, and to the fact that Congress has amended the law so as to grant the right of registration to non-residents, every presumption will be indulged that Congress had

no such *actual intention*, and as it did not express such intention, the laws which it was adopting should not be construed as is contended for by the counsel for the plaintiffs. Looking to the language of these Statutes of Arkansas, such construction can not be drawn therefrom; we call attention to the language of section 31, chapter 182, of an act of Congress putting in force certain chapters of Mansfield's Digest, whereby they (Ark. Statutes), are limited thus, viz.:

> "Which are not locally inapplicable or in conflict with this act, or with the laws of Congress relating to the subjects specially mentioned in this section, are hereby extended," etc.

The rule of *stare decisis* can not have the effect of precluding this court from adopting such construction as it may find was manifestly the correct one. Sutherland on Statutory Construction says (sec. 316),

> "This rule has never been carried so far as to preclude courts from investigating former decisions when the question has not undergone repeated examination and become well settled."

See to same effect, Ency. Law, vol. 23 p. 36.

The subject was clearly elucidated in the case of Murray vs.. C. & N. W. Ry. Co., 92 Fed. Rept., 868, opinion by Caldwell. It was contended in that case that an exception to the bar of the statutes of limitation existed in cases of undiscovered fraud; that while the statutes of limitation did not expressly make such exceptions, still, the Supreme Court of Iowa had so held in several cases, and it was contended that the U. S. Circuit Court must follow those decisions, but it was held that the U. S. Courts determine for themselves what the common law is, and are not bound by the decision of the supreme court of the state, engrafting

an exception onto the statute, where, by the rules [of construction] of the common law the court is not authorized to engraft such exceptions. The authority of the court to engraft anything nto the statute in such a case will depend upon the construction under the rules of the common law; and this, the federal courts determine for themselves.

Hence, our conclusion is that the common law was the law of the Indian Territory with respect to the mortgages given by Blocker to the interpleaders, and being bona fide, and that actual notice thereof by the reading of the mortgages being communicated to the attaching creditor, they constitute a superior lien to that of the attachment of the respondents, and that therefore judgment should go for appellant.

There is another view to take of this question:

The plaintiffs' debt was contracted long before interpleader's mortgages were made. Plaintiffs advanced no money, gave no credit and lost nothing by these mortgages, but on the contrary it would work a fraud on interpleader if plaintiffs can now come in and take the attached property.

In the case of Ferguson v. Edrington, 49 Ark. 241, the court said:

> "A bona fide purchaser has been defined to be one who at the time of his purchase advances a new consideration, surrenders some security or does some act which leaves him in a worse position if his purchase should be set aside and purchases in the honest belief that his vendor has a right to sell without notice, actual or constructive, of any adverse rights, claims, interests or equities of others in and to the property sold."

In Union National Bank v. Oium, 54 N. W. Rep. 1034, there was a contest between an attaching creditor of chattels and the chattel mortgagee thereof whose mortgage had been executed before, but not recorded until after, the levy of the writ of attachment. The debt for which the attachment had been run was contracted before the giving of the mortgage. The Court, in its opinion, set out the statute of the state of North Dakota, which is as follows:

> "A mortgage of personal property is void as against creditors of the mortgagee and subsequent purchasers and incumbrancers of the property in good faith for value unless the original, or an authenticated copy thereof, be filed in the office of the register of deeds of the county where the property mortgaged or any part thereof is at such time situated."

The court then says:

> "We hold that as the debt for which the attaching creditor seized the property was a debt contracted before the execution and delivery of the mortgage and as it does not appear that the creditor after the giving of the mortgage and before it was filed in any manner altered his position to his detriment, the mortgage lien is paramount even assuming that a valid levy was made before the mortgage was filed."

To the same purport is Overstreet v. Manning, 67 Tex. 657.

In Argall v. Seymour, 48 Fed. Rep. 548, Judge McCrary held that a chattel mortgage, not recorded for thirty days, is good as against an attaching creditor whose debt accrued prior to the mortgage, but invalid as to those accruing subsequent thereto.

Moore v. City, 42 Ark. 66, was a suit to enjoin the collection of taxes. The plaintiff was a purchaser un-

der a defectively acknowledged mortgage, and the city attempted to defend on the ground that plaintiff got no title because of such defectively acknowledged mortgage. The court, at page 69, said:

> "The defect in the certificate of acknowledgment is a matter with which the city has not the remotest concern, and of which it can take no advantage. It was not a purchaser for value."

To the same purport is Voglesang v. Fischer, 128 Mo. 404.

In Bank v. Bates, 120 U. S. 564, the same doctrine is maintained.

In Burton v. Sittlington, 128 Mo. 164, the Supreme Court of that state held that as between a mortgagee of chattels and an attaching creditor for a debt accruing prior to the mortgage where the mortgagee did not record his mortgage until after the attachment, that the mortgage was paramount to the attachment lien.

These Missouri cases were referred to by the Supreme Court in delivering its opinion, in Moore v. City, supra, and hence we must conclude their enunciations were adopted by that court.

In Buttons v. Rathbone, 12 N. Y. S. 667, the court held that one who takes a chattel mortgage to secure a pre-existing debt, but parts with no obligation or other rights, is not a mortgagee in good faith within the meaning of the statute of New York, so as to entitle him to a preference over a prior unfiled mortgage of the same chattels.

In St. Paul, etc., v. Berkeley, 55 N. W. Rep. 60, the Supreme Court of Minnesota held that where a chattel mortgage is bona fide, a creditor seeking to establish a superior equity must show that he belongs to the

class of creditors who are entitled to challenge the validity of the mortgage as against them because not duly and seasonably recorded.

And in Littauer v. Houck, 52 N. W. Rep. 464, and followed in the 53 N. W. Rep. 919, the Supreme Court of Michigan held that a chattel mortgage is good as against the mortgagor's other creditors whose claims accrued before the mortgage was executed, though by mistake it was not filed in the proper office.

The authorities are based on the hypothesis that when one seeks to take advantage of an erroneous filing of a mortgage or a failure to file it at all, he must show that he has been hurt.

Here the plaintiff's debt accrued ten years, before the interpleader invested its money in these cattle, and they can not say that the failure of the law to give a place for recording this mortgage was detrimental to them.

II.

Is the statute brought into the Indian Territory by the Act of Congress concerning chattel mortgages in violation of the Constitution of the United States?

The question presented here is: Does the act which declares that no chattel mortgage shall be a lien on the property mentioned until it is recorded in the county or district where the mortgagor resides conflict with that provision of the constitution which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states?"

Now, this act says to the resident of the Territory:

> "*You may mortgage your cattle and may retain possession thereof, and have the care, custody, con-*

trol and management of them. In other words, you may be left in the undisputed possession and right of disposition of your cattle, limited only by the terms of your mortgage."

But to the non-resident, the citizen of the state of Texas, the statute says: "*You may not mortgage your cattle which are in the Indian Territory.*" *Is this granting an equal privilege to the citizen of Texas that is enjoyed by the citizen of the Territory in respect to mortgaging his cattle?*

In Cummings v. Missouri, 4 Wall. 321, the Court said that:

> "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in pursuit of happiness all avocations, all honors, all positions are alike open to every one, and that in the protection of these rights all are equal before the law."

Can it be said that the citizens of Texas, when he comes into this territory with the sanction of the government, has all the rights and privileges that the citizen of the Territory has?

Again, the Court in Williams v. Bruffy, 96 U. S. 183, says:

> "This constitutional provision has been held, in repeated adjudications of this court, to prohibit discriminating legislation by one state against the citizens of another state, and to secure to them the equal protection of its laws and the same freedom by its own citizens in the *acquisition and enjoyment of property.*"

Now, it must be admitted that the Texan, who owns property in this Territory, has not all the rights and privileges which are accorded to the resident. He has

not the "equal protection of the law" in "the enjoyment of his property." He does not then stand on the same footing with the resident. This regulation seems therefore to be repugnant to the clause of the constitution mentioned. It is a direct discrimination between citizens of the Territory and those of all other states in respect of an ordinary and extensive branch of dealing. It makes that which is lawful within the Territory for all persons residing therein, to wit: to mortgage their chattels, unlawful for citizens of any other state, and thereby imposes onerous conditions on non-residents which are not imposed upon its own citizens or persons residing within its borders. It makes the discrimination rest upon the very fact which alone determines in the case of citizens of the United States whether a person is or is not a citizen of one state or another, to wit: residence in a state.

The Court, in Ward v. Maryland, 12 Wall., 430, declared that it

> "Would not attempt to define the words 'privileges' and 'immunities' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt these words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state for the purpose of engaging in lawful commerce, trade or business without molestation, *to acquire personal property*," etc.

Blackstone says:

> "The third absolute right inherent in every Englishman is *that of property, which consists in the very use, enjoyment and disposal of all hi sacquisitions*, without any control or diminution, save only the laws of the land."

See also Blake v. Mc. Clung, 172 U.S. 239 & 176 U. S. 59

And in the Slaughter House cases, 16 Wall., 119, Judge Bradley says:

> "But even if the Constitution were silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they are now. It was not necessary to say in words that the citizens of the United States should have and exercise all the privileges of citizens—the privilege of buying, selling and enjoying property, the privilege of engaging in any lawful employment for a livelihood, the privilege of resorting to the laws for redress of injuries, and the like. Their very citizenship conferred these privileges, if they did not possess them before. And these privileges they would enjoy whether they were citizens of any state or not. Inhabitants of Federal territories and new citizens, made such by annexation of territory or naturalization, though without any status as citizens of a state, could, nevertheless, as citizens of the United States, lay claim to every one of the privileges and immunities which have been enumerated."

Swayne, J., in speaking of the thirteenth and fourteenth amendments, in that same case, says:

> "These amendments are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies. They are, in this respect, at the opposite pole from the first eleven."

It will be noted by a glance at the constitution of the section under consideration is not a restriction upon any state like the fourteenth amendment is. It does not say that no state shall legislate so as to prevent citizens of other states from enjoying all the privileges and immunities of citizens of their own state, but it is a declaration, as I have quoted above from Blackstone, of the fundamental rights recognized by all free men;

it is an inalienable right; a right which every citizen of the United States has, and it is a right, which has been held by this court that neither Congress nor state could invade. On the other hand, the fourteenth amendment declares that no state shall breach these rights, privileges and immunities.

As was stated by Miller, J., in delivering the opinion in the Slaughter House cases:

> "The sole purpose of this amendment (the fourteenth), was to declare to the several states that whatever those rights as you grant or establish them to your own citizens or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

In speaking of the article under consideration, viz.: section 2 of article 4, of the Constitution.

Washington, J., in Corfield vs. Coryell, 4 Wash., C. C., 371, said:

> "The privileges and immunities in question are those which are fundamental which belong of right to all citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union from the time of their becoming free, independent and sovereign," including "protection by the government with the right to *acquire and possess property* of every kind."

In Campbell vs. Morris, 3 H. & McH., 554 the Maryland Court of Appeals, in considering this same question, said:

> "It means that the citizens of all the states shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by

> the laws of the state in the same manner as the property of the citizens of the state is protected. It means that such property shall not be liable to any taxes or burdens which property of the citizen is not subject to."

And the Supreme Court of Massachusetts, in Oliver vs. Washington Mills, 11 Allen, 281, speaking through Bigelow, C. J., said:

> "It is obvious that the power of a state to impose different and greater burdens or impositions on the property of citizens of other states, than on the same property belonging to its own citizens, would directly conflict with this constitutional provision."

The legislature of Massachusetts had enacted a law requiring domestic corporations to reserve and pay into the state treasury a certain portion of all dividends declared on shares of non-residents, and the court held the law in conflict with that provision of the constitution.

Cooley, in his work on Constitutions and Limitations, says on page 397:

> "Although the precise meaning of privileges and immunities is not very distinctly settled, as yet, it appears to be conceded that the constitution secures in each state to the citizens of all other states the right to remove and carry on business therein; the right by the usual modes *to acquire and hold property, and to protect and defend the same in law;* the right to the usual remedies for the collection of debts and the enforcement of other personal rights and the right to be exempt, in property and person, from taxes or burdens which the property, or persons of citizens of the same state, are not subject to."

Story on the Constitution, par. 1806, says:

> "It is obvious that if the citizens of each state were to be deemed aliens to each other they could not take or hold real estate or other privileges, except as other aliens. The intention of this clause (of the constitution) was to confer on them, if one may so say, a general citizenship, and to communicate all the privileges and immunities which the citizen of the same state would be entitled to under like circumstances."

Among the leading enunciations of the doctrine above maintained is the case of Farmers' Loan and Trust Co. vs. Chicago, etc., 27 F. R. 46, a decision rendered by Gresham, J., in which he held that a statute of Indiana, which declared that all conveyances in trust of real or personal property to a non-resident, except by will, should be invalid, was in conflict with section 2, article 4, of the United States Constitution, and was therefore void. It is a very instructive case, and the learned judge considers at great length section 2 of article 4 of the Constitution. Following that case was that of Roby vs. Smith, 30 N. E. Rep. 1093, also reported in the 131 Ind. 342. That was a decision concerning the same statute, and it was there held by the supreme court of Indiana, that that statute was in violation of section 2 of chapter 4 of the Constitution of the United States.

In rendering the decision in Farmers' Loan and Trust Co. vs. Chicago, etc., *supra*, Gresham, J., used this language in reference to the said Indiana statute:

> "It is a statute which denies to residents of other states the right to take and hold in trust, otherwise than by last will and testament, real and personal propery in Indiana. The right is asserted to deny to persons associations or corporations,

> within or without the state, power to convey to any person in trust, not a resident of Indiana, real or personal property within the state. This is a plain discrimination against the residents of other states. If Indiana may disqualify a resident of another state from acting as trustee in a trust deed or mortgage which conveys real or personal property as security for a debt due to himself alone, or for debts due himself and other creditors, it would seem that the state might prohibit citizens of other states from holding property within the state, and to that extent from doing business within the state. No state can do the latter. A person may, and frequently does, acquire a property interest by a conveyance to him in trust. A citizen of the United States can not be denied the right to take and hold absolutely real or personal property in any state of the Union nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others. This right is incident to national citizenship."

In the celebrated case of Lemon vs. The People, 20 N. Y. 562, the court discusses very fully this clause of the Constitution. Under that clause they said:

> "Citizens of every other state can hold property by the same titles by which citizens of this state may hold it and by no other; and any discriminating legislation which would place them in a worse situation than citizens of this state would be unlawful."

But plaintiffs contend that this Registration Act is but the exercise of the police power of the state.

Let us see:

Police power, the exercise of which is held not to violate the Constitution, is confined to cases where such legislation only becomes a proper subject of state control on account of the necessity of the case, or as it is sometimes called, "The Law of Overruling Necessity."

In this case the question is not one of regulation—it is not one where a non-resident is seeking a right by virtue of the recording acts.

The question here is, did Congress prohibit a non-resident from making a mortgage, and if it did, had it the right to do so under the Constitution?

The power of a legislature over the subject of the recording acts is in all particulars as complete as it is over any other subject not in conflict with some constitutional provision.

In the case of Third National Bank vs. Devine Gro. Co. reported in the 34 L. R. A. 446, the Supreme Court of Tennessee said that:

> "To take from property its chief element of value, and to deny the citizen the right to use and transfer it in any proper and legitimate method, is as much depriving him of his property as if the property itself was taken."

This case shows that notwithstanding the power of the legislature to pass statutes of fraud, and fraudulent conveyances, and restrict the disposition of property by preferences, this power does not extend to it the right to make unreasonable restrictions so as to deprive a person of the right to use his property in the making of legitimate contracts disposing of the same, and, as is shown elsewhere in the briefs in this case, if the construction of the laws of Arkansas, as contended for by the appellant, should be adopted, a non-resident is absolutely prohibited from giving a lien upon his property, however honest and fair the transaction might be. As we have seen, and as will further appear herein, this is not within the police power of the legislature of Arkansas, nor is it within the power of congress under the Constitution of the United

States. If it should be so construed, it repeals, to that extent, Articles 1977 and 1978, Revised Statutes of the United States. It would seem, therefore, that resort could not be had to the police power of congress to uphold this law.

The case of Holden vs. Hardy, 169 U. S. 366, contains an instructive review of the decisions with reference to the power of the state to limit and regulate the right of contract. It is there said:

> "As the possession of property, of which a person can not be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provisions. Indeed, we may go a step further, and say that as property can only be legally acquired as between living persons by contract, that a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property would be equally invalid."

It would seem to us, therefore, that this case does not fall within that class of cases where it is proper to resort to what is known as "Police Power," and that neither the legislature or congress can arbitrarily restrict the right to contract, and it is for the courts to decide whether it has done so or not in each case according to all the circumstances.

Another position taken by plaintiffs' counsel is that though the United States Constitution may limit the power of the states to enact police regulations which might abridge the rights of non-resident citizens, there is no such limitation on congress. In this position he is also at fault.

Congress has only such powers as have been delegated to it by the people through the constitution, and the powers thus delegated are much more limited than are those which are reserved to the states.

The Am. and Eng. Ency. of Law, article on the "Police Powers," says, at page 742:

> "The constitutional provisions which limit the power of the Federal government to that which is expressly delegated to it and the state and Federal constitutions which exclude the state legislatures from the invasion of private and public rights impose peculiar restraints upon the exercise of police power by either the state or Federal government."

Cooley, in his work on Constitutional Limitations, page 10, says:

> "The government of the United States is one of enumerated powers; the national constitution being the instrument which specifies them and in which authority should be found for the exercise of any power which the national government assumes to possess. In this respect it differs from the constitutions of the several states which are not grants of powers to the states, but which apportion and impose restrictions upon the powers which the states inherently possess."

The police powers are not easy to define, but this Court, in Munn vs. Illinois, 94 U. S. 113, have given this definition (page 145).

> "The power of the state over the property of the citizen under the constitutional guaranty is well defined. The state may take his property for pub lic uses, upon just compensation being made therefor. It may take a portion of his property by way of taxation for the support of the government. It may control the use and possession of his property, so far as may be necessary for the protection of

the rights of others, and to secure them the equal use and enjoyment of their property. The doctrine that each one must so use his own as not to injure his neighbor—*sic utere tuo ut alienum non laedas*—is the rule by which every member of society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of state authority. *Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent a public calamity, the power of the State over the property of the citizen does not extend beyond such limits.*"

In his commentaries, after speaking of the protection afforded by the constitution to private property, Chancellor Kent says:

"But though property be thus protected, it is still to be understood that the law-giver has the right to prescribe the mode and manner of using it, *so far as may be necessary to prevent the abuse of the right to the injury or annoyance of others, or of the public.* The government may, by gerenal regulations, interdict such uses of property as would create nuisances and become dangerous to the lives or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, *on the general and rational principle that every person ought to so use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.*"

Potter's Dwarris Statutes, 444, and Prentice on Police Power, page 1, denominate police power as "*the Law of Overruling Necessity.*" From all which one must indeed have a very vivid imagination if he can place within the category mentioned a registration act. It can not be said that the enactment of a registration law is required because of any "*overruling necessity.*" Neither is it required for the protection of the lives, limbs, health, peace, comfort or quiet of a people, nor to prevent nuisances.

Yet, if a registration statute is held to fall within the category named, still this does not help the matter, because in its exercise of the police power congress can not discriminate against non-residents or otherwise overstep the boundary by which it is hedged in by the constitution. The constitution is as much a bar against congress making police regulations which discriminate in favor of the citizens of one state or territory as it is against its making any other discriminating law.

Neither does it make any difference by what name such a statute is styled. "A rose by any other name would smell as sweet." A court will look behind the title, and if the law in any manner, directly or indirectly, discriminates against any citizen of the United States, or his property, or in any other manner, directly or indirectly, discriminates against any citizen of the United States, or his property, or in any other manner conflicts with or violates the constitution, it will hold the law to be void.

III.

In regard to the law of February 3, 1897.

Plaintiffs lay great stress upon the fact that the judgment in the attachment suit was rendered before

this statute was enacted. We think we have met this proposition in what we have said heretofore, but desire to call the court's attention to some authorities which meet their other contention, viz.: that no law will be held to be retroactive which by so holding would disturb vested rights

In Watson v. Mercer, 8 Pet. 88, this court through Judge Story, said:

> "As to the first point, it is clear that this court had no right to pronounce an act of the State legislature void, as contrary to the Constitution of the United States from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the state from passing retrospective laws generally, but only *ex post facto* laws.
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> In the next place, does the act of 1826 violate the obligations of any contract? In our judgment, it certainly does not, either in its terms or in its principles. It does not even affect to touch any title acquired by a patent or any other grant. It supposes the title of the *femes covert* to be good, however acquired; and only provides that deeds of conveyance made by them, shall not be void, because there is a defective acknowledgment of the deeds by which they have sought to transfer their title. So far, then, as it has any legal operation, it goes to confirm and not to impair, the contract of the *femes covert*. It gives the very effect of their acts and contracts which they intended to give; and which, from mistake or accident, has not been affected."

In Satterlee vs. Matthewson, 2 Pet., 380, the court said:

> "If the effect of the statute in question be not to impair the obligation of either of those contracts,

and none other appear upon this record, is there any other part of the Constitution of the United States to which it is repugnant? It is said to be retrospective. Be it so, but retrospective laws which do not impair the obligation of contracts or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument. * * *

"The objection, however, which was most pressed upon the court, and relied upon by the counsel of the plaintiff in error, was, that the effect of this act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a state law of this description; nor are we aware of any decision of this or of any circuit court which has condemned such law upon this ground, provided its effect be not to impair the obligation of the contract; and it has been shown that the act in question had no such effect upon either of the contracts which have been before mentioned."

In Ewell vs. Daggs, 108 U. S., the court at pages 150-1, says:

"The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws without a saving clause operated retrospectively, so as to cut off the defense for the future even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld as against all objections, on the ground that they deprived parties of vested rights, or impaired the obligations of contracts. The very point was so decided in the fol-

lowing cases: Curtis vs. Leavitt, 15 N. Y. 9; Savings Bank vs. Allen, 28 Conn. 97; Welch vs. Wadsworth, 30 Conn. 149; Andrews vs. Russell, 7 Blackf. 474; Wood vs. Kennedy, 19 Ind. 68; Town of Danville vs. Pace, 25 Grat. 1; Parmlee vs. Lawrence, 18 Ill.; Woodruff vs. Scruggs, 27 Ark. 26.

"And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of defendant to avoid his contract is given to him by statute, for purposes of his own, and not because it effects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains in *fieri*, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy and forms no element in the rights that inhere in the contract. The benefit which was received as the consideration of the contract, which, contrary to law, he actually made is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. Read vs. Plattsmouth, 107 U. S., 5568; and see Lewis vs. McElvain, 16 Ohio, 347; Johnson vs. Bentley, Ib. 97; Trustees vs. McCaugh, 2 Ohio Stat. 152; Satterlee vs. Matthewson, 16 S. & R. 169; S. C. in error; 5 Pet. 380; Watson vs. Mercerm, 8 Pet. 88."

The opinion of Justice Miller in Steamship Company, vs. Joliffe, 2 Wall. 450; so ably presents this question, that we quote therefrom. He said:

"The cases of Yeaton vs. United States, 5 Cranch, 281, and Schooner Rachel, 6 Id. 329, in this court, decide *that on appeal from an admiralty decree that decree will be reversed, because the law under*

which the vessel became forfeited had expired by its own limitation pending the appeal, although the vessel had been sold and the money paid in the treasury of the United States before the statue expired.

"Unquestionably, the appellate tribunal is bound to take judicial notice of the repealing statute. If so, I fail to see how it can affirm a judgment which, by the law in existence at the time of such affirmance, has become erroneous, though not so when rendered. And so are the authorities without exception, so far as I am aware.

"But it is said that plaintiff, by his judgment in the court below, acquired a vested right to the sum of money for which he recovered that judgment, which could not be taken away by repeal of the act.

"I deny that a party suing another for a statute penalty can acquire a vested right in the sum which the law allows in such cases, until he has actually received the money into his own possession. Such is evidently the principle deducible from the cases of Yeaton vs. United States, above referred to. Such is also the express decision of this court in the case of Norris vs. Crocker, 13 Howard, 29, except that in that case the repeal took place while the suit was pending and before judgment. This court held in the language of Judge Catron, that, 'as the plaintiff had no vested right in the penalty, the legislature might discharge the defendant by repealing the law.'"

A judgment is only one of the steps in the progress of a suit by which the plaintiff, if successful, obtains what he is seeking. It only declares the right of the party, but does not create it. It may be set aside or reversed, and gives the plaintiff no right superior to that which he had before he obtained it.

If the claim on which he proceeded was a vested right, it remains so after judgment; not because of the judgment, but because it existed before, and the judg-

ment only ascertains that fact, and enables him to enforce it. If the judgment was founded on a statute right, it still only declares that on the facts as the law then stood, the plaintiff was entitled to recover, but that right is no more sacred or no more protected from legislative action than before. If there is such a thing as a vested right in a statutes penality, it must become vested either when the facts occur which give the right, or when the plaintiff makes his claim to the benefit of the statute by commencing an action for the sum which the law allows. That no such right accrues from either of those circumstances the cases which I have last cited seem conclusive.

Cooley Constitutional Limitations, says on page 465 (6th Edition):

> "These laws must be confined to the parties to the original contract, and to such as have succeded to their rights with no greater equities. A subsequent *bona fide* purchaser can not be deprived of the property."

On pages 468 and 469 he says it makes no difference that the act was passed after suit is brought.

> "The bringing suit vests in the party no right to a particular decision, and his case must be determined on the law as it stands, not when it was brought, but when the judgment was rendered."

Drake on Attachments, sec. 228, says:

> "As the whole office of an attachment is to seize and hold the property until it can be subjected to execution, its lien is barren of any beneficial results to the plaintiff unless he obtains judgment against the defendant and proceeds to subject the property to execution."

Attachment is part of the remedy given by statute for the collection of a debt. There is no such thing as

vested right in a remedy. The remedy may be changed at the will of the legislature, provided a substantial remedy is left or provided. In section 480, Sutherland on Statutory Constructions, says:

> "No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights."

What is a vested right? The same author in section 164 defines it as follows:

> "When a right has arisen on a contract or a transaction in the nature of a contract authorized by statute has been so far perfected that nothing remains to be done by the party asserting such rights, the repeal of the statute will not affect it, or an action for its enforcement. It has become a vested right which stands independently of the statutes."

Citing Pacific Mail, SS. Co. vs. Jolliffee, 2 Wall, 450. In the same section Sutherland says:

> "A law can be repealed by the law-giver, but the rights which have been acquired under it while it was in force do not thereby cease. It would be an act of absolute injustice to abolish with a law all the effects which it had produced. This is a principle of general jurisprudence; but a right to be within its protection must be a vested right. It must be something more than a mere expectation based upon an anticipated continuance of the existing law. If, before rights become vested in particular individuals, the convenience of the state induces amendment or appeal of the laws, those individuals have no cause to complain."

In Section 163, Sutherland on Stat. says:

> "Rights depending upon a statute (and the right to an attachment is such a one, there being no such thing at common law) and still inchoate, not

perfected by final judgment or reduced to possession are lost by repeal or expiration of the statute."

This rule applies to mechanics' liens given by statutes where the requisite proceedings to fix the lien have not been completed at the date of the repeal. After levy of an attachment, statute may destroy the lien by repeal of attachment law, which could not be done if it were vested right. Drake on Attachments (6 Ed.), sec. 224, and note and sec. 412. Liens given to landlords may be abolished by a repeal of the statute giving the lien. Stocking vs. Hunt, 3 Denio. Imprisonment for debt may be abolished and prisoner discharged. Sedgwick on Statute 645, citing Sturgiss vs. Crowningshield, 4 Wheat, also Story on the Constitutional 1398.

In Johnson vs. Richardson, 44 Ark. 365, the court held that retroactive laws were not unconsitutional; that a suit does not entitle a party to a special remedy or decision, but the case must be determined by the law in force when decided.

The case was this: A woman who had made a defective acknowledgment of a deed conveying realty, had brought suit for dower; the legislature enacted a law declaring that all such acknowledgments shall be held good. The woman contended that this act was inoperative to her because,

First. It was passed after her suit was brought.

Second. To give it effect would deprive her of a vested right.

The Supreme Court reversed the court below, which had been in favor of the woman, and held as above.

Chanscellor Kent says: "An estate is vested when there is an immediate right of present enjoyment or a present fixed right of future enjoyment."

4 Kent's Com. 202.

Van Syckle, J., in Moore v. State 43 N. J. L. 243, says: "Very loose notions are entertained in respect to vested rights. * * * What are vested rights? In the widest sense they are rights which are complete and consummate so that nothing remains to be done to fix the right of the citizen to enjoy them."

In Calder v. Bull, 3d Dall. 386, this court per Chase, J., defines a vested right thus: "A right of property is a perfect and exclusive right, but before he has acquired a better right to the property than any other person in the world. The right only to recover property, is not a perfect and exclusive right."

In Borman v. Schafer, 18 Wis. 437, the court held that the right of a judgment creditor to file a transcript of his judgment, and thus take necessary additional step to perfect his lien, was not a vested right and might be taken away by the legislature.

In Randell v. Kreiger, 23 Wall. 148, this court held a retroactive law validating a married woman's deed not violative of the constitution.

In Thompson v. Lee Co., 3d Wall, 331, this court said, "If a legislature possessed the power to authorize an act to be done, it could by a retrospective act cure the evils which existed, because the power thus conferred had been irregularly executed. The question with the legislature was one of policy and the determination made by it is conclusive.

In Curry v. Landers, 35 Ala. 280, the court held an act of the legislature destroying the lien of a judgment valid, saying: "We regard the exercise of such a power by the legislature as effecting the remedy only, and not impairing the obligation of the contract."

In U. S. Savings & Loan Co. v. Miller, 47 S. W. Rep. 17, the Supreme Court of Tennessee held valid an act of

the legislature making good the mortgage of a foreign corporation which was invalid because of its failure to comply with the pre-existing law, thereby cutting out the lien of a subsequent judgment creditor although his execution was levied on the mortgaged property.

In Curtis v. Whitney, 13 Wall. 68, this court held that a statute does not necessarily impair the obligation of a contract, because it may effect it retrospectively, or because it enhances the difficulty of performance to one party or diminishes the value of the performance to the other, provided it leaves the obligation of performance in full force.

In Trustees v. Rider, 13 Conn. 87, the Supreme Court of Connecticut held that a statute granting money to a private corporation or individual, to be acquired in future, and through the official action of public agents, may be repealed at any time before the acquisition and application of the money, and the grant defeated before it is fully executed. Such a grant is not a perfect obligation capable of enforcement.

In Bradon v. Green, 7 Humphrey, 130; a Tennessee case, the Supreme Court of Tennessee decided that a statute giving a new remedy to defeat usurious contracts is constitutional, even as to existing contracts and judgments upon them. See Wilson v. Hardesby, 1 Maryland Chauncery, 66.

In the Covington Railroad v. Kenton, 12 B. Munroe, 147, 148, the Court of Appeals of Kentucky say that provisions in a railroad charter, providing for county subscription to stock and the collection of a tax to pay the same, are no contract between the State and the railroad company, and may be repealed at any time before they are complete by full execution. The legislature may take away by statute what by statute is

granted, unless by execution of the powers granted, private rights, in some definite thing or property, have become vested.

A legislative act, this court held in Railroad Co. v. Nesbit, 10 Howard, 400, 401, cannot impair the obligation of a contract, unless at the time of its passage, some one not subject to legislative control, "by contract with the State, has been vested with certain, perfect, absolute rights of property," which rights are divested or impaired by such act.

It is also held in Beers v. Bingham, 9 Peters, 359, that "the right to imprison (for debt) constitutes no part of the contract; and discharge of the person of the party from imprisonment does not impair the obligation of the contract, but leaves it in full force against his property and effects;" and, in Mason vs. Hake, 12 Wheaton, 370, where A gave a prison-limits bond, and by an act of the legislature was discharged from arrest and imprisonment, that the act was valid.

In Oriental Bank v. Frieze, 18 Maine, 109, the Supreme Court of Maine says:

> "When a person by existing laws becomes entitled to a judgment or to have certain real or personal property applied to the satisfaction of his debt, he is apt to regard the privilege as a vested right, not considering that it has its foundations only in the remedy, which may be changed, and the right thereby destroyed."

It was accordingly held that the legislature may take away rights given by statute, until those rights are perfect, and vested by judgment recovered.

In the Sunbury Railroad Co. vs. Cooper, 33 Penn. State, 278, 281, 285, the Supreme Court of Pennsylvania lay down principles which justify fully the action of the court below in its refusal to grant a mandamus.

The legislature of Pennsylvania had there pledged the revenues of the State canals to the payment of certain State bonds. Afterwards an act was passed for the sale of these canals, and different appropriation of the proceeds. The diversion of the pledge made by the legislature was held to be without legal redress.

Numerous cases are cited in effect similar with the principle above generally asserted by us. See Mayor vs. The State, 15 Md. 376; Trustees v. Tatman, 13 Ill. 28; Stocking v. Hunt, 3 Denio, 274; Fisher v. Lackey, 6 Blackford, 373; Evans v. Montgomery, 4 Watts & Sergeant, 220; Springfield v. Commissioners, 5 Pickering, 508.

Story on the Constitution, 6th Edition, par. 1957, says:

> "There are some other cases in which the intervention of the legislature to affect the rights of parties has been sustained that may at first view appear more questionable than those just referred to. But where the principle that underlies them is seen and understood, there is no difficulty in accepting them as sound and the principle itself as safe. The limitation upon such intervention is that vested rights are not to be distributed; but, as has been well remarked, *courts do not regard rights as vested, contrary to the equity and justice of the case. A party has no vested right in a rule of law which would give him an equitable advantage over another; and such rule may therefore be repealed and the advantage thereby taken away.*"

3 Parsons on Contracts, at page 552, says:

> "*It is to be observed, that, as to the remedy, there can be no difference between a debt existing before and one contracted after the law is made. There may be a difference as to the propriety or expediency of the law, but none as to the right of the State to pass the law; for this right is perfect, ex-*

cept so far as it is controlled by this clause in the constitution. And on this ground, it has been held that nothing in the constitution of the United States prevented a State from passing a valid law to divest rights which had been vested by law in an individual, because this was not a contract. And it has been decided in Connecticut that a State law making valid a void contract does not impair the obligation of a contract within the intent of the constitution of the United States."

I will call the attention of the court to another case, that seems to me as it did to the court below, conclusive of this cause. That is the case of Green vs. Abraham, 43 Ark. 420.

The facts of the case were these: One McReynolds had made a chattel deed of trust on his crop of corn to Green, the plaintiff, but the acknowledgment having been taken by the trustee in the deed of trust, was invalid; after this instrument had been recorded a creditor of McReynolds got judgment against him and on an execution under that judgment Abraham, a constable, and defendant in the action, had levied upon and seized the mortgaged corn. At this period the legislature of the state enacted a healing act (March, 1888), making all such acknowledgments theretofore taken valid. Whereupon Green, the mortgagee, brought this action for the possession of the corn. The Supreme Court of Arkansas, in its opinion, said:

> "But the healing acts are not permitted to interfere with or disturb vested rights. A purchaser from McReynolds of this crop, between the recording of the trust deed and the passage of the law could not be deprived of his property by an act which retrospectively deprived McReynolds of the title he had when the purchase was made. But the constable, levying his execution upon the corn as the property of McReynolds, is not a purchaser.

> He has, indeed, succeeded to the rights of McReynolds, so far as this action is concerned, but his equities are not greater than those of McReynolds, and neither he nor McReynolds can have a vested right to a defense based upon an informality which does not effect his substantial equities."

The court held that the law of March, 1883, was a retrospective law, and that the mortgage was made just as effectual by reason of that law as it would have been had it been properly acknowledged and recorded at the time it was acknowledged and recorded, *and that the creditor got no vested right in the property seized by virtue of his execution till it was sold thereunder, and the purchase price actually paid therefor.* That is a leading case, but it had been preceded in Arkansas by several other cases of the same purport.

In 1843 the legislature enacted a law which was retrospective and curative in purport, very similar to the law under discussion, and in Elliott vs. Pierce, 20 Ark. 508, the court held that the law validated the deed.

And in Woodruff vs. Scruggs, 27 Ark. 26, the court held that a note made in 1866, which was usurious, and hence void under the law, as it then stood, was made valid upon the repeal of the usury law; which repealing act declared that "no plea of usury nor defense founded upon any allegation of usury shall be sustained in any court in this state."

In that case the court held that this law was retrospective, saying that "all general rules on construction must yield to the clear intention of the legislature, sufficiently expressed. In this instance the intention is clear and fully expressed when it declares 'no plea of usury nor defense founded upon any allegation of usury shall be sustained in any court in this state.'

It makes no reservations or exceptions, but is emphatic, commanding the court not to sustain any such plea." The court further says:

> "While this statute and the repeal of all previous usury laws may affect injuriously the antecedent legal rights of the borrower, the appellant in this case, under the contract, still the law is binding, although the debtor may have 'antecedent rights of the nature of vested rights.'"

In Vaughan vs. Bowie, 30 Ark. 283, the court said:

> "A repealed statute must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted and *concluded* whilst it was an existing law."

Following Green v. Abraham the court, in Reid vs. Hart, 45 Ark. 41, again construed the Act of March, 1883, and held that the act related to pending suits, and made a deed of the same force as if it had been properly acknowledged at first, unless rights had meanwhile become vested "in other *innocent* parties." That is the language of the court. The court further said:

> "The curing act placed the deed of the guardian upon the footing that it would have occupied as evidence" had it been properly acknowledged.

They say further:

> "Laws regulating evidence may embrace past transactions. One can not have a vested right in a rule of evidence."

The case of Green vs. Abraham, has never been overruled, or its doctrine doubted until the brief of my learned opponent, but on the contrary, it has been repeatedly referred to as enunciating correctly the law and has been repeatedly affirmed.

In Johnson vs. Richardson, 44 Ark. 365, the court reaffirmed the doctrine of Green vs. Abraham, and also cited and approved the doctrine of Mercer vs. Watson, 1 Watts. 330, S. C., 8 Peters, 88. This case supports the doctrine which we have endeavored to enunciate, to wit: that until an attachment has not only ripened into a judgment and the judgment into an execution, but further, until the property has been sold under the execution and the money paid over to the sheriff, the legislature may enact laws withdrawing the property from the lien of attachment.

Again, in Appell vs. Kelsey, 47 Ark. 413; Beard vs. Dansby, 48 Ark. 187, and State *ex rel.* vs. Hicks, 48 Ark. 519, the court refers to and approves Green vs. Abraham.

In Cupp vs. Welch, 50 Ark. 294, the court cites and approves Green vs. Abraham, and holds that the law making power may enact retrospective laws so as to affect, if not divest, vested rights.

Again, in Sidway vs. Lawson, 58 Ark. 117, the court refers to and approves Green vs. Abraham. In this decision the court three times mentions that case and affirms all the doctrines enunciated therein.

The conclusion which I reach is that my learned opponent looks obliquely upon this case, but it seems to be very well considered by the Supreme Court of Arkansas.

Six times has it been affirmed and quoted from approvingly, and I don't know how many more.

Now, if that decision is the law of the land, then is the act of February 3 what we maintain it is, to wit: a retrospective act and one which prevents the plaintiff from acquiring any interests in the mortgaged property, unless he succeeds in attaching, getting a

judgment, an execution, a sale and the purchase price in his hands, before the interpleader steps in.

The Supreme Court of Arkansas has again very recently rendered a decision which seems to be likewise conclusive on this point, especially as it is a construction of retroactive laws made by the court of last resort in the State of Arkansas.

The case of Steers vs. Kinsey, decided by the Supreme Court of Arkansas, on the 20th of October, 1900, and reported in the 58 S. W. Rep., page 1050, was an action brought to quiet title of certain real estate. The facts were substantially these:

A corporation in Arkansas, in October, 1889, made a mortgage with power of sale on its real estate, which mortgage was so improperly acknowledged as to render the acknowledgment invalid under the Arkansas law. The indebtedness which the mortgage was given to secure maturing, and not being paid, the mortgagee sold the land by virtue of the power given him therein. This was in September, 1891. On the 10th day of December, 1890, the plaintiff, Steers, brought an action in attachment against the mortgagor and levied upon the land in controversy, and on March 29, 1892, he recovered a judgment against the land and the mortgagor, and the attachment was sustained. Under that judgment, the lands were sold on the 14th of May, 1892, and purchased by the plaintiff in this action. The controversy in the suit was between the purchaser under the mortgage, and the purchaser under the execution in the attachment suit. On the 11th day of March, 1891, and subsequent to the execution of the mortgage, and also subsequent to the commencement of the attachment suit, but prior to the sale of the land under the mort-

gage, the legislature of Arkansas enacted a law, which declared, in effect, that conveyances of land heretofore recorded in which the acknowledgment was invalid, should be as valid as though the acknowledgment was in due form. The question at issue was as to whether the attachment creditor obtained a vested right, by virtue of his attachment as against the mortgage.

The Supreme Court, in passing upon this question, said:

> "If the statute made the mortgage valid as to the attaching creditors the rights of those holding under the mortgage could not be affected by the present suit. The statute cured defects in the acknowledgment to the mortgage and give it, except as to persons having acquired vested rights in the land before the passage of the acts, the same force and effect it would have had had it been properly acknowledged in the first instance. The only question that remains then is, whether the parties who brought the attachment suits acquired vested rights in the land by the bringing of the suit and the levy upon the lands. Now, a vested right must be something more than a mere expectation based upon the anticipated continuance of existing laws. It must have become a title, legal or equitable, to the present or future enjoyment of property in some way or another. Black's St. Const., 430; Sutherland's St. Const. Par. 164. But parties have no vested rights in remedies or matters of proceedure, and we see nothing in these attachment proceedings that constituted a vested right on the part of the plaintiff therein to the property attached. The attachments were levied upon the land after the mortgage under which the Arkansas City Improvement Co. (the purchaser under the mortgage sale) holds, had been executed and recorded, and we think that it was within the power of the legislature to give to such mortgage

the effect intended by the parties thereto by curing the formal defect in the acknowledgment. Rosenthal v. Wehe, 58 Wis. 621; 6 Am. & Eng. En. of Law, 2nd Ed. 947; Stephenson v. Doe. 8 Blackf. 508; Butler v. Palmer, 1 Hill, 324.

We are therefore of the opinion that the mortgage under which the Improvement Co. claims the land was, after the passage of the act of 1891, superior to the liens acquired by the attachments. The attachments were subject to the mortgage and the title acquired by the Improvement Co. under the mortgage laws of the land conveyed by the mortgage is superior to that acquired by those who purchased these same lands at the sale ordered to satisfy the judgments obtained in the attachment suits."

Our opponents try to distinguish Green v. Abraham from the case at bar in that here plaintiffs claim vested rights growing out of the lien of their attachment, while there the constable levied on the property by virtue of an execution and that such a levy did not vest a right while an attachment levy did. Now comes the Steers case where the Supreme Court of Arkansas says the levy of a writ of attachment on property gives no vested right therein; thus effectually answering plaintiff's contention.

To my mind these two cases: Green-Abraham and Steeres, conclusively deny plaintiff's rights so far as the Supreme Court of Arkansas can do so.

Again, this interplea presented an entirely different issue from those in the case of McFadden vs. Blocker. The only issues between them were the ground of attachment (non-residence) and the indebtedness of Blocker to them. There was no issue as to the ownership of the property. Blocker would not be heard to deny that he was the owner—and in the absence of a

claim to it by a third party, it would have been treated as Blocker's property.

But the interplea presents an issue of ownership in interpleader. This makes a separate suit, has to be tried separately, and is between the plaintiff and the interpleader without regard to Blocker.

In Sannoner vs. Jacobson & Co., 47 Ark., pp. 40, 41, 42, Judge Cockrell, delivering the opinion of the court, says:

> "One who claims title to attached property is permitted to intervene in the first attachment suit and then contest his rights with the plaintiff in that proceeding. * * * The intervening suit is a separate and distinct one, however, and the issues are made between the plaintiff in the attachment suit and the intervener without regard to the common defendant. * * *
>
> "It can not with propriety, be contended that the intervener is let in for the purpose of defending the suit and disputing the grounds of attachment in lieu of the defendant. The intervener is treated as a stranger to the attachment proceedings," and

Shinn on Attachment, sec. 440, says:

> "The judgment records of the proceedings of intervention should be kept distinct from the records of the proceedings in the attachment suit."

In Section 429, Shinn says:

> "An intervener can not defend in the attachment suit in lieu of the defendant. The only fact that is permitted to be put in issue in the absence of fraud is the claimant's right and title to the attached property. Intervention is an interlocutory proceeding, and the only consequences of a judgment in intervention is the conclusion that the thing in dispute is or is not the property of the claimant."

There is no issue of fraud in this case. On the other hand it is distinctly admitted that there was no fraud. The interpleader was no party to the suit between McFadden and Blocker, and it had no right to defend or be heard against the order sustaining the attachment or against the judgment against Blocker. That being so, nothing that was done in the suit between McFadden and Blocker, after the filing of the interplea, can in any way whatever affect the interest of interpleader.

Black on Judgments, section 226, says:

> "It has been declared by the Supreme Court of the United States that a sentence in a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his right, and is not entitled to respect in any other tribunal."

This is a principle too elementary to require a citation of authorities, and we cite but one. Huiscamp vs. Moline Wagon Company, 121 U. S. Rep. ~~971 (1 Ed.)~~ 319 was a suit by Moline Wagon Company vs. Rummell and Culter. An attachment was sued out on the ground that defendants had fraudulently conveyed or assigned their property, etc. It was levied on property in possession of Huiscamp, who claimed it. There was a judgment against defendants, and the ground of attachment was controverted and judgment rendered sustaining the attachment; Cutler, one of the defendants, not appearing and thereby confessing the charge of fraud. On the trial of the interplea plaintiffs offered in evidence the proceedings had on trial of the plea in abatement, which were admitted over interpleader's objections. Judge Blatchford, delivering the opinion, says:

> "Such proof could not be made as against the interpleaders in view of what the evidence which they offered tended to show by proving that the issue as to the intent of Rummell had been tried and found against him in the trial on his plea in abatement. That was an issue to which the interpleaders were not parties, and the record of its trial was wholly inadmissible as against the interpleaders. The interpleaders were not parties to the proceedings, did not control them and can not be affected by them."

Then, when the attachment was levied in this case, the lien acquired was inchoate, imperfect, contingent, so it was when the interplea was filed, and so it was after the judgment settling the issues between McFadden and Blocker. A contingent lien on the chattel could not by an adjudication of the issues between McFadden and Blocker be made a fixed and perfected lien on them—for interpleader was not and could not defend or be heard against the rendering of the judgment, which appellant claims perfected the lien on the cattle claimed by interpleader. It would be a radical departure if a lien could be fixed and perfected on property while the party owing it or claiming it had not been heard or had his day in court.

The judgment against Blocker does not purport to foreclose the lien, but counsel for plaintiffs says that is not necessary. Waples on Attachment, sec. 506, says:

> "Judgment for plaintiff after issue joined is complete as a personal one—such judgment, however, in attachment suits is usually attended by the addition: 'with privilege on property attached.'"

This or equivalent words, is the judcial recognition of the attachment lien— a perfection of the previously

incipient right; an elimination of the hypothetical feature of the *jus ad rem*. It is a judgment against the property; a judicial finding that it is an indebted thing and a virtual condemnation of it to pay its owner's debt. Now this is where the parties are only plaintiff and defendant. The author then proceeds:

> "Whether such a decree *in rem* is made by the insertion of the clause above quoted or its equivalent, or is made by implication only in the personal judgment the effect is the same."

That is, it is a judicial finding, it is an indebted thing, a virtual condemnation of the property.

How could the judgment against Blocker by a judicial condemnation of the cattle claimed by the interpleader, when it was no party to the proceeding? But the judgment against Blocker does not purport to condemn the property, but recognizes the fact that it can not do so. After sustaining the attachment and rendering judgment against Blocker, the judgment proceeds as follows:

> "And it appearing to the court that Evans-Snider-Buel Co. have interpleaded in this cause, claiming the property levied on under the writ of attachment sued out by plaintiff and levied upon as the property of J. R. Blocker, and that said interplea is yet undisposed of and waiting trial thereon."

Then follows that plaintiff had applied for a change of venue to Tahlquah which was granted, and it concludes as follows:

> "And plaintiffs are given to the first day of the next term of court to be held at Tahlequah to plead, answer or demur to said interplea."

These recitals most clearly show that this is an interlocutory judgment, and that something remained to

be done before the cattle should be disposed of. Now there is in that judgment neither recital nor implication that the cattle are condemned or the lien perfected on them.

But if plaintiffs' contention is correct, why try the interplea at all—if it was settled that the cattle were condemned to the payment of the judgment against Blocker without interpleader having anything to say about it, then interpleader would cease to have any interest in the trial of his interplea, as the cattle had already been appropriated, regardless of its claim, and the trial of the interplea would be a mere matter of form, or worse, a mockery, simply to settle an issue that no one had the slightest interest in. If the lien is fixed and perfected by the judgment, how is it that the cattle have not been sold under an execution or order of sale? When plaintiff and defendant are the only parties, an order sustaining the attachment, and a judgment against the defendant perfects the lien, and an order of sale follows.

In the case at bar there was an order sustaining the attachment as a judgment against Blocker, and if that perfected the lien on the cattle, that is all the plaintiff asked and there is nothing to hinder the court making an order directing the sale of the attached property. But plaintiffs' counsel say:

> "An order of sale was neither necessary nor proper, for the property had been taken under section 390 of Mansfield's Digest—an order could not be made until the trial of the interplea when all proper orders should and would be made under section 351 and 391."

They say that no order of sale was necessary under these sections or under the general attachment law. We contend that an order of sale (which a judgment

properly drawn always contains) is necessary under both. Section 347 Mansfield's Digest, of the general attachment law, says:

> "If the moneys from the sale of perishable property and proceeds of garnishment are not sufficient, the court shall order a sale of any other attached property."

Section 391, says:

> "If the property is found to be the property of the defendant, the claimant shall deliver it to the sheriff, whenever demanded, after execution shall come to his hands to be levied thereon."

This does not say after execution against defendant's property generally shall come to his hands, but after one comes to his hands ordering him to levy on the property claimed in the interplea and which had been found to be the property of the defendant, and of course, such an execution would have to issue from a judgment condemning the property attached to be sold. So it seems that the property attached does not become liable to be appropriated for the payment of the judgment against Blocker until on the trial of the interplea it is found to be the property of Blocker and not of interpleaders. This difference between plaintiff's counsel and ourselves is set at rest by Judge Mansfield, the compiler of Mansfield's Digest, and afterwards a judge of the Supreme Court of Arkansas, who, in a note to section 391, says: "For form of judgment, etc., on trial of interplea under this act, see Adams et al. vs. Hobbs, 27 Ark., which says:

> "In the case before us we find that the court first tried the original suit, rendered judgment by default against Zane and ordered execution against the cotton attached, in the event that the interpleas should be determined in favor of the plaintiff.

> The court then tried and determined the interplea, finding that the cotton levied on was subject to the attachment, and rendering the following judgment: 'It is therefore considered that the plaintiffs have execution against said cotton and if the same is not delivered to the sheriff of Pulaski county by said interpleader on demand, that execution issue against the sureties on interpleader's bond,' etc."

The court further said that said judgment followed the language of the act, which was the same as section 390-1 of Mansfield's Digest, with almost unnecesary particularity. The court proceeds as follows:

> "The act requires that executions shall issue upon the judgment in the original suit against the defendants in this case, *in rem* against the cotton alone."

In Arkansas the correct practice is to settle all issues between plaintiff and defendant before trying the interplea. (Sanger vs. Flow, 1 U. S. C. C. A. 56; Waples and Platter vs. Low, 4 U. S. C. C. A. 207.)

Plaintiffs claim vested rights by virtue of the judgment against Blocker, which they contend is a final judgment, fixing their lien on the attached cattle.

Black on Judgments, section 23, says:

> "As a general rule a judgment must possess the character of finality in disposing of the rights of all the parties concerned before it can be considered final with reference to any of them."

In section 24 the author says:

> "It is always requisite that a judgment, in order to be final, should determine all the issues involved in the cause."

Interpleader was a party to one branch of the case, and claimed some rights, and every order and judg-

ment that was had in the case prior to the trial of the interplea was interlocutory as to the interpleader and its rights, and the contingent attachment lien would not be perfected upon the property claimed by interpleader until it had its day in court.

Plaintiffs claim vested rights by virtue of their judgment. They had no vested right in the lien, for that was but a remedy, and there can be no vested right in a remedy. They had no vested right in or to the attached cattle, for the title to the cattle, which had been put in issue by the interplea, had not been adjudicated, consequently their right to the cattle was contingent.

Anderson's Law Dictionary, under the head of vested rights, says:

> "In the widest sense vested rights are rights which are complete and consummated, so that nothing remains to be done to fix the right of the citizen to enjoy them."

After the judgment against Blocker there remained an undisposed of interplea and the right to enjoy the attached cattle.

All the cases cited in plaintiffs' brief on the subject of vested rights are where there was an attachment, a judgment and an execution levied. Not one where the right was vested by levy of the attachment except Conrad vs. Smith, *supra*. They claim that their levy entitles them to the same protection as if they were bona fide purchasers for value and without notice. Without noticing the authorities relied on, it is sufficient to say that they are not, for the reason that if they were, subsequent legislation could not affect them, while all the authorities agree that the legislature may repeal the attachment law and thus dissolve the attachment.

Plaintiffs did not acquire any property in the cattle by their levy. Shin on Attachment, section 313, says:

> "The attaching creditor acquires no property, either general nor special, in either realty or personality by his attachment. The title remains in the debtor until the attachment lien is merged into a judgment condemning the property, and a sale is made thereof."
>
> "In Atkins vs. Swope, 36 Ark. 537, Judge Eakin, delivering the opinion, says: 'It (the attachment) brings under the control of the court, not of the plaintiff, property to be held for the purpose. The plaintiff has no right to it in any sense as property.' In Tenant vs. Watson, 58 Ark., page 255, it is said: 'It (the attachment) creates no estate in the property. It is neither *jus ad rem* nor *jus in re*.' Then appellants had no property in the cattle to be deprived of. Their lien was inchoate, imperfect, contingent. Their judgment against Blocker did not perfect the lien on the cattle, interpleader being no party to that transaction. Appellants' rights consist in being permitted under the law, as it then stood, to take advantage of a defective record and take property which interpleader's money paid for, and for which they paid nothing, and appropriate it to the payment of an old indebtedness of Blocker to them. The defective record (which has been cured) was the only basis of appellants' claim to take these cattle on their judgment against Blocker. And in the langnage of Mr. Sutherland, section 484, "Rights resting upon such curable defects alone can not be deemed meritorious and are not entitled to the protection accorded vested rights."

Therefore, we say that these mortgages were properly received by the court. All these decisions except Steers v. Kinsey were in the reports long before the passage of the third of February law, and hence, the

court must presume that when that law was enacted congress had these decisions in view. In addition to the arguments on this point here presented, I desire to call the court's attention to the opinion of the U. S. Cir. Ct. of Appeals in this case, and for the convenience of this court I have printed it and attach it hereto.

Wherefore we pray this court to affirm the judgment of the United States Circuit Court of Appeals.

Respectfully submitted,

H. M. POLLARD,

Of counsel for Defendants in Error.

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT.

No. 1403.—MAY TERM, A. D. 1900.

Evans-Snider-Buel Company et al., Plaintiffs in Error, vs. William McFadden et al., Defendants in Error.	In Error to the United States Court of Appeals in the Indian Territory.

Mr. U. M. Rose and Mr. H. M. Pollard (Mr. C. B. Stuart, Mr. W. E. Hemingway and Mr. G. B. Rose were with them on the brief) for the plaintiffs in error.

Mr. W. T. Hutchings and Mr. N. B. Maxey (Mr. J. B. Clayton was with them on the brief) for the defendants in error.

Before CALDWELL, SANBORN and THAYER, Circuit Judges.

The record in this case discloses the following facts, in the light of which it is to be determined: On June 17, 1896, the Evans-Snider-Buel Company, the principal plaintiff in error, held two deeds of trust in the nature of mortgages, one dated April 23, 1896, and the other May 19, 1896, covering about six thousand seven hundred and seventy-five head of cattle, which deeds of trust had been executed by John R. Blocker, who was at the time a resident and citizen of Bexar County, State of Texas. The cattle described and covered by the two deeds of trust were at the time in pasture near the town of Muskogee, in the Creek Nation of the Indian Territory. The deeds of trust were given to secure the payment of notes executed by John R. Blocker to the amount of about $130,000, which were held at the time by the Evans-Snider-Buel Company and rep-

resented money that had been advanced by that company to Blocker to enable him to purchase the cattle in controversy. The testimony shows without any contradiction that Blocker had not advanced any money of his own to purchase the cattle but that they had been acquired with funds furnished for that purpose by the Evans-Snider-Buel Company. Both deeds of trust were filed for record and were recorded, within a day or two after their execution, in the Clerk's office of the United States Court for the Northern District of the Indian Territory, that being the district in which the mortgaged property was located. One of the mortgages, being the one that was first executed to secure notes to the amount of $122,184.60, was also recorded the day after it was executed in Bexar County, Texas, where the mortgagor resided.

On June 17, 1896, William McFadden and Son, the defendants in error, commenced a suit by attachment against John R. Blocker in the United States Court for the Northern District of the Indian Territory upon a judgment in the sum of $55,875.71, which the attaching creditors had recovered against John R. Blocker in Jefferson County, Texas, on May 26, 1887. On June 29, 1896, they caused the writ of attachment in that suit to be levied on the cattle covered by the aforesaid deeds of trust, which were then in pasture near Muskogee in the Indian Territory. At the time of directing the levy of the writ of attachment McFadden and Son were aware of the existence of the two deeds of trust aforesaid, they having obtained a description of the cattle on which they directed the levy to be made by examining the description contained in said deeds of trust as then recorded in the Indian Territory.

On July 14, 1896, the Evans-Snider-Buel Company gave bond as interpleader in the cause, in the sum of $150,000, and having given such bond in accordance with law, was permitted to retain possession of the attached cattle. The writ issued in the attachment suit was returnable on the 3rd day of December, 1896, and at the return term of the writ, to wit: on January 27, 1897, the Evans-Snider-Buel Company filed its interplea in due form, asserting therein that the cattle were not subject to seizure and sale as the property of John R. Blocker but were its property. Two days later, to wit: January 29, 1897, judgment by default in the sum of $55,875.71 was rendered against J. R. Blocker in the attachment suit, he having failed to make answer to the complaint.

Subsequently the issue arising on the interplea in the case as between the Evans-Snider-Buel Company and William McFadden and Son was twice tried and resulted on each occasion in a verdict in

favor of the interpleader and against the attaching creditor, which judgments, however, were in each instance reversed on appeal by the United States Court of Appeals in the Indian Territory. The opinion of that court on the first appeal is reported in 48 S. W. Rep. 1043. On the last reversal the United States Court of Appeals in the Indian Territory rendered a judgment in favor of the attaching creditors and against the interpleader and the sureties on its bond in the sum of $72,250.35. The interpleader has brought the case to this court for review.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Among the numerous chapters of Mansfield's Digest of the Laws of Arkansas which were extended over and put in force in the Indian Territory by the act of Congress of May 2, 1890 (26 Stats. 81, 95, c. 182), was chapter 110, entitled "Mortgages," which chapter contains among others the following sections:

"Section 4742. All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded—if for lands, in the county or counties in which the lands lie, and, if for personal property, in the county in which the mortgagor resides.

"Section 4743. Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the Recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

Prior to the adoption of the chapter concerning mortgages as the law of the Indian Territory, it had been decided by the Supreme Court of Arkansas in *Main* v. *Alexander*, 9 Ark. 112, that by force of the aforesaid sections a mortgage on personal property executed in that state was good as between the parties thereto, though not acknowledged and recorded, but that it constitutes no lien upon the mortgaged property as against strangers until it is acknowledged and recorded in the mode prescribed by the statute although they have actual notice of its existence. The doctrine last stated had been recognized and enforced in the State of Arkansas in several other cases prior to May 2, 1890, but in some cases, notably in *Martin* v. *Ogden*, 41 Ark. 186, 192, and in *Ford* v. *Burks*, 37 Ark. 91, 94, it had

been criticised as harsh and unjust and not in harmony with equitable principles as they prevail elsewhere. It had also been decided as early as 1886 in *Watson* v. *Thompson Lumber Co.*, 49 Ark. 83, that a foreign corporation, not being a resident of that State, could not execute a mortgage on personal property located in that State which it owned, and by placing it of record create a lien which would be good as against strangers. In *Main* v. *Alexander* the controversy arose between a mortgagee whose mortgage was recorded but not properly acknowledged and a creditor of the mortgagor who had attached the mortgaged property subsequent to the execution and record of the mortgage, and it was decided that the lien of the attaching creditor was paramount. In the case of *Watson* v. *Thompson Lumber Co.*, the controversy arose between a mortgagee who held a mortgage executed by a foreign corporation that was recorded in the county where the property was situated, and certain judgment creditors of the mortgagor company who had caused executions to be levied on the mortgaged property, subsequent to the execution and recording of the mortgage, and it was held that the lien of the judgment creditors was paramount to that of the mortgagee.

On February 3, 1897 (29 Stats. 510, c. 136), Congress passed an act to the following effect:

"That section forty-seven hundred and forty-two of Mansfield's Digest of the Laws of Arkansas, heretofore put in force in the Indian Territory, is hereby amended by adding to said section the following: 'Provided, That if the mortgagor is a non-resident of the Indian Territory the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated.'"

As this statute in express terms validated all mortgages theretofore made by non-residents of the Indian Territory on personal property there located which had been recorded in the judicial district where the property was situated, and therefore embraced and validated the two mortgages that had been executed by J. R. Blocker in favor of the Evans–Snider–Buel Company—one of the principal questions discussed before this court concerns the power of Congress to enact the statute aforesaid and give to it such retrospective operation. It will be observed that William McFadden and Son, hereafter referred to as the attaching creditors, caused the writ of attachment in the action brought by them against J. R. Blocker, the mortgagor, to be

levied on the cattle that were conveyed by the mortgage, about seven months before the act of Congress validating the mortgage was approved; also, that the judgment by default was entered in that case against the attached debtor five days before the law was enacted. But when the act was approved the interplea of the Evans–Snider–Buel Company in the attachment suit was still pending and undetermined as well as when the judgment by default was taken, and no trial of the issue existing between the interpleader and the attaching creditors was had until several months thereafter, to wit: on April 20, 1897.

We deem it wholly unnecessary to indulge in any extended discussion of the question which has been mooted, whether the act of Congress aforesaid impairs the obligation of a contract and is for that reason void, first, because the inhibition against the exercise of such power which is contained in section 10, Article 1, of the Federal Constitution is not addressed to the national legislature, but to the legislatures of the several states; *Mitchell* v. *Clark*, 110 U. S. 633, 643; Legal Tender Cases, 12 Wall. 457; Beach on Modern Law of Contracts, sec. 1633; and second, because no contract is disclosed by the record which the act of Congress in question operates to impair. It is true that the attaching creditors have a judgment against J. R. Blocker and that judgments are sometimes termed "contracts of record," but such general statements mean only that the law will imply a promise on the part of a judgment debtor to pay a judgment that has been recovered against him and that he may be sued in form *ex contractu* on such implied promise. A contract of that nature, however, which does not rest on the mutual assent of the parties thereto, but is forced upon the judgment debtor as the result of a legal implication—is not such a contract as the Federal Constitution was intended to protect against legislation tending to impair its obligation. This proposition is well established by controlling authority. *State of Louisiana, ex rel. Folsom*, v. *Mayor of New Orleans*, 109 U. S. 285, 288; *Garrison* v. *City of New York*, 21 Wall. 196, 203.

If the act of Congress of February 3, 1897, above quoted, is invalid, it is made so by virtue of the fifth amendment to the Federal Constitution, which, in so far as it is pertinent here, declares that "no person * * * shall be deprived of life, liberty or property without due process of law." This is a limitation on the power of Congress, and the question is, whether the attaching creditors will be deprived of a property right in the cattle which they have caused to be seized under the writ of attachment in their favor, if the act is given effect according to the manifest purpose of the lawmaker.

It is urged in behalf of the attaching creditors that the lien obtained by virtue of the writ of attachment was of such a nature that it could not be impaired by an act of Congress even if it had been passed prior to the entry of the judgment by default against J. R. Blocker, the mortgagor, and certain authorities are cited in support of that contention, notably *Day* v. *Madden*, 9 Colo. App. 464; *Mulnix et al.* v. *Spratlin et al.*, 10 Colo. App. 390; *Hall* v. *Stephens*, 65 Mo. 670, 681; and *Hannahs* v. *Felt*, 15 Iowa, 141; but three of these cases, the same being those that are first cited, were decided in states whose constitutions at the time declared that "no * * * law retrospective in its operation * * * * shall be passed," and in two of the cases the ruling to the effect that the lien of an attachment cannot be divested by a legislative enactment *at any time after the writ is levied*, appear to have been based mainly on the theory that to give an act of the legislature the effect of impairing an existing attachment lien, would conflict with the local constitutional provision last quoted. The Iowa decision in *Hannahs* v. *Felt*, *supra*, does not appear to have been made under the influence of such a constitutional provision as has been adopted in Colorado and Missouri. In that case, however, the decision denying the efficacy of a legislative act to discharge the lien of an attachment, was based principally on the ground that the act under consideration did not in terms attempt to divest such liens, but that its real purpose was to postpone for the time being sales of property belonging to persons in the military service, either under a mortgage or deed of trust, or by virtue of an execution under a judgment or decree. In so far, however, as that decision lends support to the claim that an attachment lien cannot be impaired *at any time* by legislative action, even where the legislature is not deprived of the power to pass laws that are retrospective in their operation, it is not only opposed to the decision of this court in *National Bank of Commerce* v. *Reithmann*, 49 U. S. App. 144, 25 C. C. A. 101, 79 Fed. Rep. 582, but to the decisions of other courts in cases where the question has been expressly raised and decided. *Freiberg et al.* v. *Singer et al.*, 90 Wis. 608; *Stephenson* v. *Doe*, 8 Blackford (Ind.), 508, 513. Considered as an original proposition the weight of reason, as well as the authorities on kindred questions, sustain the view that an attachment lien, at least until a final judgment is rendered in the case, may be impaired, displaced or destroyed by legislative enactments which are designed to have that effect and that attaching creditors have no just ground to complain of such legislation. A writ of attachment is nothing more than a remedy afforded by law for the collection of a

debt. It is like a *capias ad respondendum* and a remedy of that nature may be abolished at any time by the legislature which created it. The same proposition holds good with respect to all laws which merely provide remedies for the enforcement of rights or the redress of grievances. They may be modified or repealed without reference to the effect of such legislation on pending actions, the only limitation on the power of the legislature in this respect being, that an adequate remedy must remain or be provided for the enforcement of such existing rights as have their origin in private contracts. In actions *ex contractu* litigants are not entitled to insist that they shall be afforded the same remedies or be privileged to plead all of the defenses that were available when the contract was made or that have accrued subsequently under existing laws, the rule being that remedies, and those rights pertaining to the remedy which are purely of statutory creation, may be altered or abolished even after an action is instituted, provided an adequate remedy remains for rights founded on contract, and that some defenses such as those existing under usury laws and those that have accrued under statutes of limitation may be withdrawn and rendered of no avail. These principles are so familiar that a few cases only need be cited in their support. *Terry* v. *Anderson*, 95 U. S. 628, 633; *Campbell* v. *Iron Silver Min. Co.*, 83 Fed. Rep. 643, 645, 55 U. S. App. 150; *Wilson* v. *Simon*, 45 Atl. Rep. 1022; *Campbell* v. *Holt*, 115 U. S. 620, 628; *Ewell* v. *Daggs*, 108 U. S. 143, 151; *Morley* v. *Lake Shore Ry. Co.*, 146 U. S. 162, 168; *Van Hoffman* v. *City of Quincy*, 4 Wall. 535, 553; *Butler* v. *Palmer*, 1 Hill (N. Y.), 324, 329, 330; *Curtis* v. *Leavitt*, 15 New York 1, 152, 153; Sutherland on Statutory Construction, sec. 482. We are of opinion, therefore, that a legislative body like the Congress of the United States, which is not prohibited from passing retrospective or retroactive laws, has an undoubted power to divest or impair an attachment lien at least until there has been an adjudication that adequate grounds for the attachment exist and that the lien of the attachment be enforced. The power of Congress to deal with a remedy which it has provided for the collection of a debt does not cease as respects a suitor who has simply taken the initial steps to avail himself of the remedy but whose rights have not been finally adjudicated. The power in question continues, in any event, until such time as by making use of the remedy the suitor has acquired a title to or an interest in specific property which the parties to the action are no longer privileged to deny. It is only at such period that his rights can be said to have become vested. Prior thereto they are merely conditional or inchoate.

It is insisted, however, in behalf of the attaching creditors that they acquired a vested right or a vested interest in the cattle by the rendition of the judgment by default on January 29, 1897, which could not be impaired by a subsequent legislative enactment and that *this* proposition is tenable even if it be true, as last above held, that prior to that time the lien of the attachment might have been displaced by an act of Congress. With reference to this contention it may be said, that it is undoubtedly true that by the rendition of the judgment by default Blocker, the defendant in the attachment suit, lost his right to challenge the existence of the grounds of attachment on account of which the writ had been obtained, as well as the right to deny the fact of his indebtedness to the attaching creditors or the amount thereof. These were issues which the defendant in the attachment suit, and he alone, was entitled to raise. The Evans-Snider-Buel Company was not concerned therein and it is doubtful, to say the least, if it was entitled to be heard with respect thereto, since its right to the cattle depended on other considerations. But, be this as it may, the judgment by default did not determine as against the party last named who had intervened in the attachment suit, as it had a right to do, and had denied the right of the attaching creditors to subject the attached property to the payment of their claims, *that it could be so appropriated*. That was an issue which remained to be tried when the act of Congress of February 3, 1897, was approved, and it was in nowise affected by the judgment by default. It is difficult to understand, therefore, why the entry of that judgment changed the status of the case *co instanti* as respects the interpleader and deprived Congress thenceforth of the power to enact a law which prior thereto it possessed the power to enact. The interpleader's rights were not adjudicated, since the judgment by default did not determine that the lien asserted by the attaching creditors upon the cattle in controversy was superior to the lien which was asserted by the interpleader. That question remained undecided and was left open for future consideration and decision. The phrase "a vested right" has no very precise signification. It is an expression which is not used in the Federal Constitution nor in any of its amendments, the language of the fifth amendment being that "no person * * * shall be deprived of * * * *property* without due process of law." In the law of real property, where it is most frequently employed, the word "vested" is used to define an estate either present or future, the title to which has become established in some person or persons and is no longer subject to any contingency. And when the phrase "a vested right" or a "vested interest" is used in other

relations it may with reasonable precision be held to mean some right or interest in property that has become fixed or established and is no longer open to doubt or controversy. If the words in question are understood in that sense it cannot be said that the attaching creditors acquired a vested right to the cattle as against the interpleader, by the judgment in their favor against Blocker. Instead, however, of seeking for an exact definition of the phrase in question we think it will be more profitable for present purposes to refer to some of the cases, and particularly to those which are controlling authority here, where it has been held that rights acquired in virtue of existing laws and claimed to be vested, were *not* so far vested as to become property within the meaning of the Federal Constitution and to be for that reason beyond the reach of legislative action. Thus, in the case of *Morley* v. *Lake Shore & Mich. So. Ry. Co.*, 146 U. S. 162, a judgment had been obtained which under existing laws bore interest at a given rate. After its rendition the legislature reduced the rate of interest on judgments, doing so in language which made the act applicable to judgments that had been recovered before the act was passed. It was held that this law neither impaired the obligation of a contract nor deprived judgment creditors of their property without due process of law. In *Campbell* v. *Hoyt*, 115 U. S. 620, 628, the right to plead the statute of limitations against a personal indebtedness had accrued in favor of the debtor, when the bar of the statute was removed by the adoption of a new constitution. It was held that the debtor had no right to complain. The court said, "we certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right so as to be beyond legislative power in a proper case." In *Ewell* v. *Daggs*, 108 U. S. 143, a right which had accrued to a debtor to plead usury as a defense under a law that was in force when the contract was entered into, was taken away by a subsequent enactment and it was held that no valid objection could be urged against such legislation. In *Butler* v. *Palmer*, 1 Hill (N. Y.) 324, it appeared that at the time of the sale of a judgment debtor's land under an execution, the law allowed him a certain time to redeem and the master's deed specified this period of redemption on its face. A subsequent statute repealed the law granting such period for redemption and prescribed a shorter period within which the right must be exercised. It was held that the right to redeem within the period named in the master's deed was not so far vested that it could not be shortened by legislative action. See also *The People* v. *Livingston*, 6 Wend. 526.

In *Green* v. *Abraham*, 43 Ark. 420, a mortgage improperly acknowledged had been placed of record, which by reason of a defective acknowledgment was not notice to subsequent purchasers or lienors. Afterwards the mortgaged property was attached under a writ against the mortgagor, and thereafter the legislature validated the record of the mortgage. The mortgagee having brought replevin to recover the attached property from one who claimed it under the attachment, it was held, in substance, that the interest of the attaching creditor in the attached property was not vested but could be and that it was in fact displaced by the subsequent enactment validating the record of the mortgage. The following cases are similar to those already cited, and, as we think, uphold the same doctrine. *Freeborn* v. *Smith*, 2 Wall. 160, 175; *Baker's Executors* v. *Kilgore*, 145 U. S. 487; *Terry* v. *Anderson*, 95 U. S. 628, 633; *Garrison* v. *City of New York*, 21 Wall. 196, 205; *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285, 289; *Baugher et al.* v. *Nelson*, 9 Gill (Md.) 299, 309; *Town of Danville* v. *Pace*, 25 Grattan 1, 15; *Satterlee* v. *Matthewson*, 16 Serg. & Raw. 169; *Wilson* v. *Simon*, 45 Atlantic Rep., 1022. It may be difficult in some cases to fix the precise date at which a right can be said to be fully vested and for that reason to have become property within the meaning of the Federal Constitution, when the right in question is purely of statutory creation, or has been acquired by pursuing some remedy which the law affords to suitors, and is in no sense an obligation arising out of contract; but we are of opinion that the right invoked in the case at bar was not vested on February 3, 1897, in any such sense as to be outside the sphere of legislative control. When called upon to resolve questions like the one in hand the courts have never deemed it necessary to close their eyes to the equities of the case but have frequently permitted their judgments to be influenced by the consideration that that which the legislature has done in the way of disturbing rights acquired under existing laws—was morally right and in accordance with justice and fair dealing. In an early case (*Foster et al.* v. *The Essex Bank*, 16 Mass. 245, 273), Parker, C. J., remarked, "the truth is there is no such thing as a vested right to do wrong"; and this remark has been quoted with approval by the Supreme Court of the United States and other courts. *Freeborn* v. *Smith*, 2 Wall. 160, 175; *Freeland* v. *Williams*, 131 U. S. 405, 420; *Goshorn* v. *Purcell*, 11 Ohio St., 652; *Town of Danville* v. *Pace*, *supra*; *Satterlee* v. *Matthewson*, *supra*. And in *Randall* v. *Kreiger*, 23 Wall. 137, 149, the Supreme Court said, speaking with reference to a legislative act which impaired an existing title, "claims contrary to

justice and equity cannot be regarded as of that character (that is to say, as vested rights). Consent to remedy the wrong is to be presumed."

It is our privilege and duty, therefore, in determining whether a vested right has been violated and whether Congress exceeded its just power in validating the interpleader's mortgage, to consider whether its action was dictated by a sense of justice and was right when viewed from a purely moral standpoint. If it *was*, a more liberal view may well be taken of its power to displace the attaching creditor's lien than would be permissible if its action was partial or arbitrary and without just cause or excuse.

Viewing the case for the purpose last indicated, it is manifest at a glance that Congress was influenced by the highest considerations of public policy to pass the act of February 3, 1897, and that in so far as the interpleader and others in a like situation were concerned, it was justified in stretching its constitutional powers to their utmost limit to prevent the consummation of a grievous wrong. The cattle in controversy had been bought and paid for with the money of the interpleader with the understanding that they should be mortgaged to secure its repayment. Such a mortgage was executed. The transaction was fair and honest and all the publicity was given thereto which the circumstances permitted. We understand the local law to be that the mortgage so executed was in any event good as against the mortgagor, for such was the decision in *Main* v. *Alexander*, *supra*. The attaching creditors' debt was contracted long prior to the purchase of the cattle and the execution of the mortgage and they had actual knowledge of its execution and of the record thereof before they caused the writ of attachment to be levied. The attaching creditors seem to have made a deliberate attempt to appropriate the property of the interpleader to the payment of another's debt by taking advantage of a defect in the law, doing so in utter disregard of the doctrine which has been generally accepted by courts of equity since the decision in *LeNeve* v. *LeNeve*, 3 Atkinson 646, 2 Leading Cases in Equity, 35, that one who purchases property with full knowledge of another's interest therein and with intent to deprive him of that interest is a purchaser *mala fide*. Under these circumstances it was the duty of Congress to afford all the relief against the threatened wrong which could be afforded by a liberal interpretation of its legislative powers; and it is likewise the duty of the courts, in such a case, to construe those powers liberally, to the end that a wrong may not be perpetrated through the forms of law. It may be that there is a legal presumption that when Congress extended the chap-

ter of the Arkansas statute concerning mortgages over the Indian Territory, it was aware of the interpretation that had been placed upon the various provisions of that chapter by the Supreme Court of that state; but a legislative body is not omniscient, and whatever may be the presumption, we are unable to believe that Congress possessed such knowledge *in fact*, and that it intended to deprive nonresidents of the territory of the power to make a mortgage on personal property there located which would be effectual to protect mortgages against the claims of third parties. We can conceive of no reason which would be liable to influence Congress to enact a law of that character and are therefore constrained to believe that the peculiar construction placed on sections 4742 and 4743 of the mortgage act, by the Supreme Court of Arkansas, was unknown to Congress when they were made applicable to the Indian Territory, and that it made haste to cure what it deemed an obvious defect or omission in the law as soon as its attention was directed to the defect. The act of February 3, 1897, stands on the same plane, therefore, as a curative act and should be treated as a statute which was enacted for the purpose of remedying a mistake theretofore inadvertently made by the lawmaker. When the attention of Congress was directed to the peculiar construction that had been placed on the aforesaid sections of the mortgage act in the state from which it was borrowed, it found the controversy between the attaching creditors and the interpleader still pending and undetermined. The rights of the former were *in fieri*. No court had at that time decided that they were entitled as against the interpleader to subject the mortgaged property to the payment of their judgment against the mortgagor, and believing, doubtless, that such an adjudication, if made, would defeat rather than promote the ends of justice, it undertook to forestall a possible decision of that nature by validating the record of the interpleader's mortgage. We are of opinion that the concluding clause of the act of Congress of February 3, 1897, which was designed to accomplish that end, was a lawful enactment and not in conflict with any provision of the Federal Constitution, because at the date of its enactment the attaching creditors had no such vested right or interest in the cattle in controversy as the constitution was intended to protect against legislative action.

Learned counsel for the interpleader have argued at some length that the United States Courts in the Indian Territory were and are under no obligation to construe sections 4742 and 4743 of the chapter concerning mortgages as they were construed in *Main* v. *Alexander*, *supra*, because that decision is in conflict with other decisions of the

Supreme Court of Arkansas on kindred questions and because it has been discredited by judicial criticism in the State of Arkansas and cannot be regarded as settling the true construction of the statute in controversy even in the state where it originated. They also claim that the attachment writ only operated upon such interest in the cattle as the mortgagor had at the time the writ was levied and that this interest was a mere equity of redemption, the mortgage being in any event good as against the mortgagor. Some other propositions are also advanced, all of which have been noticed, but without expressing an opinion thereon, we prefer to rest our decision on the ground heretofore stated, that the act of Congress operated to validate the interpleader's mortgage.

The judgment of the United States Court of Appeals in the Indian Territory is accordingly *reversed* and annulled and the judgment of the United States Court in the Indian Territory for the Northern District thereof, which was rendered at its March term, 1899, being for the right party, is in all things

Affirmed.

Filed Jan. 4, 1901.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1900.

W. P. McFADDEN *et al., Plaintiffs in Error.*

v.

EVANS-SNIDER-BUEL COMPANY, *Defendant in Error.*

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEAL FOR THE EIGHTH CIRCUIT.

Brief for Defendant in Error.

U. M. ROSE,
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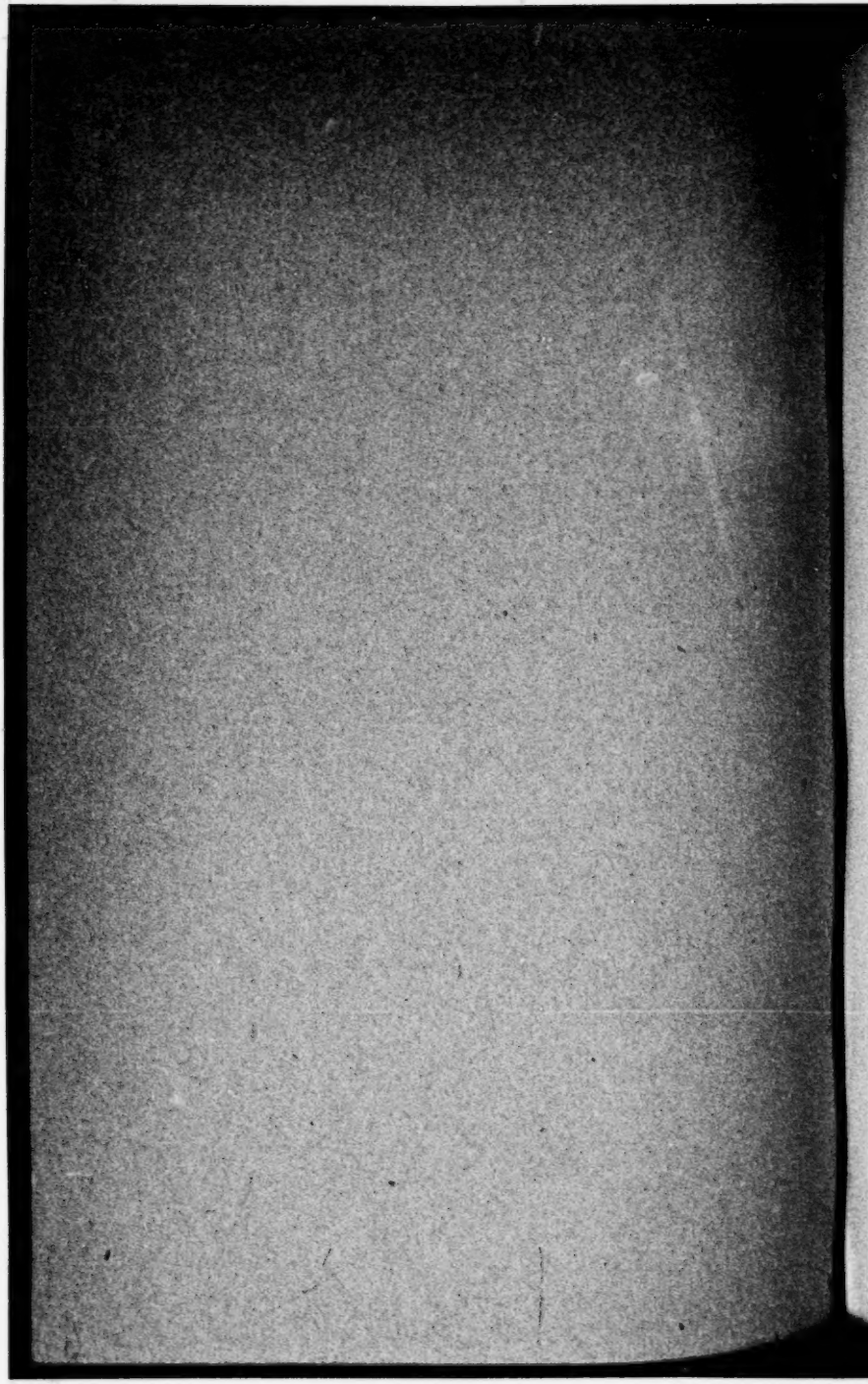
For Defendant in Error.

HENRY STEPHENS CO.



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I.

STATEMENT OF FACTS.

The Evans-Snider-Buel Company advanced to John R. Blocker about $130,000 to enable him to purchase cattle; to secure which advances Blocker executed to the Company two mortgages dated April 23, and May 19, 1896, covering about 6,775 head of cattle. The debts were evidenced by notes maturing at different periods in the future. The cattle were in the lands of the Creek Nation in the Indian Territory. The advances mentioned covered the entire purchase money of the cattle. The mortgages were duly and promptly filed for record in the clerk's office of the United States Court for the Northern District of the Indian Territory, that being the district

within which the mortgaged property was located. One of the mortgages, made to secure notes amounting to $122,184.60, was also recorded in Bexar County, Texas, where Blocker resided. The defendant in error is a corporation created and organized under the laws of Illinois.

On the 7th of June, 1896, McFadden & Son began a suit by attachment against Blocker in the United States Court for the Northern District of the Indian Territory, based on a judgment that they had recovered against him in Texas May 26, 1887, for $55,875.71. On the 29th of June, 1896, they sued out an attachment and caused it to be levied on the cattle embraced in the mortgages, knowing of the existence of the mortgages, and making use of the record of the mortgages for the purpose of getting a description of the cattle. This is a fact admitted of record.

The Evans-Snider-Buel Company gave an interpleader's bond in the penal sum of $150,000, and retained possession of the cattle. On the return of the writ they filed their interplea, claiming under the mortgages. Two days afterwards the plaintiffs took judgment against Blocker by default for $55,875.71. After that there were two trials of the issue arising on the interplea, resulting in a verdict each time for the interpleader.

The contest is the not unusual one between a mortgagee and attaching creditors. It appears in this case that the mortgagees paid full value for whatever rights they may have obtained, since they advanced to Blocker the entire purchase money of the cattle; also that, as the debt of the plaintiffs was contracted long before the cattle were bought, and the mortgages were executed, they have never paid out any money on the faith of the cattle, and have never been in any way misled or deceived concerning any fact involved in the present investigation.

The Supreme Court of the Indian Territory held that the mort-

gagee had no rights because there was no law providing for the registration of chattel mortgages made by non-residents, and because the mortgagee had not taken possession of the mortgaged property. On writ of error this judgment was reversed, and the last judgment of the trial court was affirmed, his honor Judge Sanborn dissenting. The plaintiffs McFadden & Son bring the case here by writ of error.

The Circuit Court of Appeals decided upon the sole ground that the defective registration was cured by act of Congress. As there are several other grounds leading to the same result, and equally conclusive, as we think, we shall present them also in this brief.

II.

Federal statutes extending constitution and laws of the United States over Indian Territory.

By an act of Congress entitled "An Act to provide a Temporary Government for the Territory of Oklahoma, to enlarge the Jurisdiction of the United States Courts in the Indian Territory, and for other Purposes," approved May 2, 1890, it was, among other things, provided as follows:

"Sec. 32. The Constitution of the United States, and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, and all laws relating to national banking associations, shall have the same force and effect in the Indian Territory as elsewhere in the United States."

26 Stat. U. S., 96.

III.

Federal statute extending Arkansas statutes over the Indian Territory.

The same statute contains the following provision:

"Sec. 31. That certain general laws of the State of Arkansas in force at the close of the session of the general assembly of that State of 1883, as published in 1884, in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act, or any act of Congress relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say, the provisions of the said general statutes of Arkansas relating to * * * Frauds, statute of * * * Mortgages, * * * chapter 110, to Recorders, chapter 126," and so on, designating various other chapters, including Attachments.

26 Stat. U. S., 94.

IV.

The intervention of the mortgagees and the requirements and effect of the pleadings.

This proceeding is had under sections 390-394 of Mansfield's Digest, authorizing third persons claiming attached property to give bond and interplead in the attachment suit.

The interplea is in the form of an ordinary intervention, and demands an answer from the attaching plaintiffs; and upon the interplea and the answer an issue is formed.

Deloach Milling Mfg. Co. *v.* Little Rock Milling Co., 65 Ark., 467.

The issue is between the interveners and the attaching plaintiffs alone; and the interveners are not affected by the judgment against the defendant in the attachment. That is *res inter alios acta.*

Huiscamp *v.* Moline Wagon Co., 121 U. S., 319.

Central Loan Co. *v.* Campbell, 173 id., 90.

Hershy *v.* Clarksville Institute, 15 Ark., 129.

Sannoner *v.* Jacobson, 47 id., 40.

Bloom *v.* McGehee, 38 id., 329.

Taylor *v.* Taylor, 3 Bush, 119.

Foster *v.* Goodwin, 82 Ala., 173, 2 So., 895.

Markley *v.* Keeney, 87 Iowa, 398, 54 N. W., 251.

Springer *v.* Bigford, 54 Ill. App., 198.

Otto *v.* Smith, 68 Miss., 773, 10 So., 70.

Waples-Platter Co. *v.* Low, 54 Fed., 95—Ct. App. 8th Ct.

Not only is it true that the issues between the plaintiffs and defendant and those arising on the interplea are distinct; but it is also true that the interpleader cannot controvert the plaintiffs' demand.

Sannoner *v.* Jacobson, *supra.*

Richmond *v.* Irons, 121 U. S., 53.

V.

The writ of error in this case brings up no question whatever for decision because the answer to the interplea charges no fraud.

It is certainly true that to render fraud available as a defense it must be pleaded.

Moss *v.* Riddle, 5 Cranch, 351.

Fogg *v.* Blair, 139 U. S., 126.

Jackson *v.* Reeve, 44 Ark., 496.

McIlroy *v.* Buckner, 35 id., 558.

And the facts relied on as constituting the fraud must be specifically stated in the plea or answer.

Hynson *v.* Dunn, 5 Ark., 395.
Dickson *v.* Burks, 6 id., 415.
Keller *v.* Vowell, 17 id., 447.
Conway *v.* Ellison, 14 id., 360.
Seaborn *v.* Sutherland, 17 id., 603.
Mock *v.* Pleasants, 34 id., 71.
Noonan *v.* Lee, 2 Black, 499.
Patton *v.* Taylor, 7 How., 159.
Ritchie *v.* McMullen, 159 U. S., 235.

VI.

There is no question before this court for decision, because no objection was raised to the introduction of the mortgages because of the clause allowing the mortgagor to retain possession.

The transcript shows the form which the objections to the mortgages and notes assumed:

"Plaintiffs object to the introduction of this mortgage, because it shows on its face that it was given on cattle situated in the State of Texas; that it was recorded in the State of Texas, the recording acts of which State have no force or effect upon cattle in the Indian Territory, and cannot have any force or effect on cattle which were at that time in Texas, and afterwards transferred to the Indian Territory, where they were afterwards levied upon."

The only objection made to the notes was that they were "secured by the mortgage."

The only other objection from the plaintiffs was as follows:

"We now renew our objection to the evidence offered to show that the money which was represented by these notes, and loaned to

Mr. Blocker, was invested in the cattle upon which the mortgages were given, and that said money represented by those notes was the purchase price of said cattle, and ask that all evidence pertaining to this matter be withdrawn from the consideration of the jury."

It is needless to say that this does not make the plaintiffs' case any better.

Whenever a party would object to the introduction of a written instrument he must point out the objection specifically.

Camden *v.* Doremus, 3 How., 515.

U. S. *v.* McMasters, 4 Wall., 680.

Moore *v.* Bank of the Metropolis, 13 Pet., 302.

Burton *v.* Driggs, 20 Wall., 133.

District of Columbia *v.* Woodbury, 136 U. S., 462.

And a party specifying his objection to the admission of evidence must be considered as waiving all others; or as conceding that there is no ground upon which they can be maintained.

Evanston *v.* Gunn, 99 U. S., 660.

Toplitz *v.* Hedden, 146 id., 255.

The questions discussed here were not raised either in the pleadings or the exceptions. One might read the entire transcript without suspecting that the questions argued here were even mentioned.

It is true that in this case there is a provision that the mortgagor shall remain in possession until the maturity of the notes; but we have found no decision holding that such a clause under any law avoids the deed. In the few States where under peculiar statutes it is required that a mortgagee shall take possession of the mortgaged property, the decisions, as far as we have been able to trace them, go to the effect of saying that it is the actual non-delivery, and not a clause stipulating for possession, that brings the case within the meaning of the statute. Such a clause may show the intention of the parties;

but a mere intention could not affect any one unless carried into execution. The clause in question may raise a suspicion: it does not prove a fact. In Marsh *v.* McPherson, 105 U. S., 709, it was held that "the recital in the contract that the vendors 'hereby deliver said machines at the places named in the list' to the vendee, passes to him the title and right of possession, but does not prove a delivery of actual possession."

It certainly cannot be contended that the agreement for possession written in the face of the mortgage is more objectionable than if made *dehors* the instrument by parol. In Huntley *v.* Kingman, 152 U. S., 535, the court held that "the chattel mortgage was not necessarily invalidated by the parol agreement that the mortgagor was to retain possession," though in that case the parol agreement also gave the mortgagor authority "to sell the goods at retail."

VII.

Conceding that the position assumed by the attaching creditors that the failure to record the mortgages and the failure to deliver possession of the mortgaged property to the mortgagee would avoid the mortgages on the ground of fraud, still the judgment of the trial court was correct, because there was no proof of such non-delivery.

There was not a syllable of testimony tending to show that the mortgagees did not take possession of the cattle at the time the mortgages were executed.

How were the trial court and jury to know that possession of the cattle did not follow the execution of the mortgage? How is this court to know it?

Undoubtedly fraud is not presumed, and even where alleged it must be proved.

"It is a universal rule in the construction of all deeds that fraud is never to be presumed. * * * The party that charges fraud is bound to prove it.

Conway, *ex parte*, 4 Ark., 356.

Doswell *v.* Adler, 28 id., 84.

Irons *v.* Reyburn, 11 id., 378.

"Fraud will not be inferred from an act which does not necessarily import it. It is never presumed, but must be proved; and circumstances of mere suspicion, leading to no certain results, are not sufficient proof of it."

Toney *v.* McGehee, 38 id., 427.

Splawn *v.* Martin, 17 id., 146.

Clinton *v.* Estes, 20 id., 216.

Erb *v.* Cole, 31 id., 554.

Southern Development Co. *v.* Silva., 125 U. S., 247.

By producing the mortgages and the securities mentioned in them the burden of proof was put on the attaching creditors.

Hempstead *v.* Johnson, 18 Ark., 123.

Hill *v.* Shrygley, 51 id., 57.

In this case the interpleader went farther, and proved that the securities represented so much money actually paid.

Where a creditor attacks a conveyance of his debtor for fraud the burden of proof is on him.

Cunningham *v.* Williams, 42 Ark., 170.

Colorado Coal Co. *v.* U. S., 123 U. S., 307.

"An interpleader who claims attached property under a purchase from the debtor before the issue of the attachment, must prove the purchase, but need not prove affirmatively that it was not fraudulent."

Stephens *v.* Oppenheimer, 45 Ark., 492.

And the fraud must be clearly proved.

Holt *v.* Moore, 37 Ark., 146.

Fitzgerald *v.* Walker, 55 id., 153.

"The law presumes, in the absence of evidence to the contrary, that the business transactions of every man are done in good faith and for an honest purpose; and anyone who alleges that such acts are done in bad faith, or for a dishonest or fraudulent purpose, takes upon himself the burden of showing the same."

Jones *v.* Simpson, 116 U. S., 615.

Walker *v.* Collins, 70 Fed., 70—Ct. App. 8th Ct.

In Nebraska the statute provides that all sales, mortgages, etc., of personal property shall be null and void "unless the same be accompanied by an immediate delivery," unless it shall be made to appear on the part of the persons claiming under such sale, etc., that the same was made in good faith, and without any intent to defraud such creditors or purchasers. In First National Bank *v.* Lowrey (Neb.), 54 N. W., 571, the court said:

"When the vendee or mortgagee establishes both good faith and the absence of fraud, the legal presumption of fraud arising from his failure to take possession of the property is overcome. By defendant's request No. 2 the plaintiff was not only required to prove good faith, and the absence of an intent to defraud, but the jury were told that it 'must satisfactorily explain to you why there was not immediate delivery of said property, and an actual and continued change of possession thereof.' The portion of the request just quoted was erroneous, and should not have been given."

VIII.

Legislation in Arkansas relating to mortgages and deeds, and judicial construction.

On the admission of Arkansas into the Union in 1836 a commission was created for the purpose of preparing and submitting such statutes as might seem expedient. They reported a series of statutes forming a statutory code known ever since as the *Revised Statutes,* printed in 1838. The different chapters of this collection were approved on different days; but they were all passed during the legislative session of 1837-38.

With the exception of some amendments that will be noted, all of the registration statutes relating to deeds and mortgages hereafter referred to formed a part of the *Revised Statutes,* and were carried forward in *Mansfield's Digest,* published in 1884; and they all form a part of the laws of the Indian Territory.

The Revised Statutes provided as follows:

"For the purpose of construction the Revised Statutes passed at the present session of the general assembly shall be deemed to have been passed on the same day, notwithstanding they may have been passed at different times."

Revised Stat. Ark., p. 697, sec. 24.

The Revised Statutes went into effect on a day fixed by proclamation of the governor, of which we shall speak presently.

The section as to the registration of mortgages is as follows:

"*Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before;* which filing shall be notice to all persons of the existence of such mortgage."

Revised Stat. Ch., 101, sec. 2.

The first case that came up was Main *v.* Alexander, 9 Ark., 112 (1848). The plaintiff claimed under a chattel mortgage. It was filed for record; but, the certificate of acknowledgement not being formal, the registry was not good for the purpose of constructive notice. The property was attached. The mortgagee filed a bill to foreclose, making the attaching creditors defendants, and charging them with actual notice of the mortgage prior to the issue of the attachments. The attaching creditors answered, not denying actual notice, but denying that the mortgage was a lien, because it had never been properly acknowledged and recorded.

The opinion delivered was one of the most perfunctory that ever emanated from a court of last resort. The court cited no authority, and gave no reasons; it only said:

"The instant it (the attached property) passed into the custody of the law it went out of the reach of all persons having mere inchoate rights; and those rights, if not utterly destroyed, must at least remain in abeyance until the property shall be legally released from the grasp of the attachment. The law regards a mortgage which has not been acknowledged and filed for record as a fraud upon the rights of strangers; and consequently it will not countenance and uphold it in opposition to such rights."

It would be useless to try to derive any meaning from the first of these sentences. If it means—what possibly it was intended to mean—that an attachment supersedes all prior liens, and renders subsequent liens impossible, it is plainly incorrect. The second proposition, though more intelligible, is equally untenable. There was not a circumstance on which a presumption of fraud could be based. The mortgagee had filed the mortgage for record, and had shown a disposition to give it all of the publicity possible. It was not his fault that the officer taking the acknowledgement had blundered in writing his certificate. It was inconceivable that the mortgagee

should have colluded with the officer to obtain a defective certificate that would invalidate the registration, since such an act could harm no one but himself. Under such circumstances there was no indication of fraud. Everything pointed the other way.

Kirby *v.* Tallmage, 160 U. S., 387.

Nevertheless the mortgagee not only lost his security, but his name was handed down to posterity tarnished with judicial condemnation of having committed a fraud. Such is human justice when at its worst. If the court could have foreseen later acts of injustice that would be perpetrated under the rule thus inflicted they surely would have considered the question submitted with a little more care.

What is very singular is that this decision was made in plain violation of another section of the same statute which the court was then essaying to construe.

The section, with one preceding it, is as follows:

"6. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or chattels, or things in action, or of any rents issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents and profits thereof, and every bond, suit, judgment, decree or execution made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts, or demands, as against creditors and purchasers prior and subsequent, shall be void.

"7. This act shall not extend to any estate or interest in any lands or tenements, goods or chattels, or any rents or profits out of the same, *which shall be upon a valuable consideration and bona fide and lawfully conveyed;* nor shall this act be construed to avoid any deed or sale to a subsequent *bona fide* purchaser from the grantee for valuable consideration and without any notice of fraud."

Revised Stat. Ch. 65, secs. 6, 7.

This statute is still in force, and has now to be applied by this court.

Mansf. Dig., sec. 7379.

We must now invite the attention of the court to the corresponding statute relating to the registration of deeds.

The Revised Statutes contained this provision:

"No conveyance required by the provisions of this act to be recorded *shall be valid or binding, except between the parties and their legal representatives, until the same shall have been deposited in the recorder's office for record;* not even then if shown to be made with intent to defraud prior creditors or purchasers; but shall be void against such prior creditors or purchasers."

Rev. Stat. Ch., 65, sec. 6, title "Frauds."

This statute still remains in force.

Mansf. Dig., sec. 3378.

As if this language was not sufficiently rigorous the legislature on the 19th of December, 1846, passed the following act, which still remains in force:

"No deed, bond or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, *shall be good or valid* against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; *or* against *any creditor* of the person executing such deed, bond or instrument, *obtaining a judgment or decree, which by law may be a lien upon such real estate,* unless such deed, bond or instrument, duly executed and acknowledged, or approved, as is, or may be, required by law, *shall be filed for record* in the office of the clerk and *ex-officio* recorder of the county where such real estate may be situated."

Mansf. Dig., sec. 671.

Frauds may be perpetrated by deeds with as much facility as by mortgages. Of the two sections that relating to deeds is more stringent than that relating to mortgages. The mortgage is to be no lien, and the deed is to be void except as between the parties, until recorded.

Without section 7 of chapter 65, which was evidently overlooked, the court should have held that by a rule of law which had been long established, and which it was soon to announce, it was a fraud for an attaching creditor to seize property which he knew belonged to another; and that no statute should be so construed as having been intended to promote and encourage fraud. But the section last cited was a legislative declaration that disposed of any controversy on the subject most effectually. The statutory rule was perfectly honest and just; and was the same rule that the courts have always laid down. The justice of the statutory rule was unquestionable, and the opposite rule would open the door to innumerable frauds.

Suppose that A conveyed lands successively to B and C, the latter knowing when he got his deed that B had just bought and paid for them, and had got a deed; but, trusting that because B was old or sick, or had a poor horse, or none at all, he could first get his deed filed for record, and should actually succeed in doing so, could C then stand up in a court of justice and say "I knew all of the facts; and that B had paid ten times as much as I did, or a hundred times as much; and in fact, if you please, I paid nothing at all; it matters not, but the only legal question is one of speed; and I got to the office of the recorder first?" And if he should do so, would he be justified by law in such an act of spoliation over the other man who paid full value and had got his deed?

This was the precise question that came before the court in Byers *v.* Engles, 16 Ark., 543 (1855). It was thoroughly discussed, and an elaborate opinion, consistent with the authorities, was rendered.

The action was ejectment; and the contest was between an execution purchaser as plaintiff and a prior purchaser at private sale holding under an unregistered deed, but of whose existence notice was first given at the time of the sale under execution; and it was held that the right of such prior purchaser prevailed over the claim of the purchaser under execution.

The court also held that possession of the land by the defendant holding under the unregistered deed was alone equivalent to notice to the purchaser under the execution, though other notice was actually given.

Possession is only constructive notice.

Hamilton *v.* Fowlkes, 16 Ark., 373.

Certainly actual notice, admitted of record, cannot be less efficacious than a species of implied notice which may have been no notice at all. If the converse is true then a part may be greater than the whole.

The court base their decision largely on the case of Le Neve *v.* Le Neve, 3 Atk., 646, 2 Lead. Cas. Eq., 35, decided by Lord Hardwicke nearly 200 years ago. In that case the act of parliament required all deeds to lands in Middlesex to be registered, and provided that if not registered they should be "adjudged *fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial be registered as by this act is directed, before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim.*"

After citing various cases, Lord Hardwicke said:

"The ground of it is plainly this: That the taking of a legal estate after a notice of a prior right, makes a person a *mala fide* purchaser; and not that he is not a purchaser for a valuable consideration in every other respect. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear legal right of the

estate, *and after knowing that* he takes away the right of another person by getting the legal estate. *Now if a person does not stop his hand, but gets the legal* estate when he knew the right was in another *machinatur ad circumveniendum.*"

It is needless to say that this righteous decision of that great judge has become one of the fundamental principles of jurisprudence.

The court in Byers *v.* Engles quote from Chancellor Kent, saying that this "is a settled rule in the English and American law."

In speaking of the rule thus laid down, Mr. Pomeroy says:

"This question was presented to the English courts of chancery at an early day, and was settled by them in accordance with the general principles of equity; and their decisions have with great uniformity been adopted and followed by the American courts. * * *

"This conclusion, reached originally by the court of chancery, has in England furnished a rule for that tribunal alone, and has not been accepted by the courts of law; in this country it is recognized and enforced alike by the courts of equity and of law, for the reason that both have jurisdiction in matters of fraud. The doctrine is, in fact, a mere application of the broader general principle, that a person who purchases an estate, although for a valuable consideration, after notice of a prior equitable right, makes himself a *mala fide* purchaser, and will be held a trustee for the benefit of the person whose right he sought to defeat."

2 Pom. Eq., sec. 659.

See also

Kerr, Fraud and Mistake, p. 266, and cases cited.

Priest *v.* Rice, 1 Pick., 166, and cases referred to in note.

In speaking of this rule the court in Byers *v.* Engles was extremely explicit:

"But if this information is attained by other means (than by registration), the object of the act is accomplished, and on the prin-

ciple that when the reason ceases the law becomes inoperative, and its sanctions do not attach. (P. 551.)

"These interpretations show the reason of the law; from which it is evident that *notice is equivalent to registration as to all persons.* (P. 553.)

"As the object of the statute was to prevent fraud by means of secret conveyances, when the conveyance is open, and the creditor has notice, the means by which it is communicated is comparatively unimportant." (P. 548.)

Two years before the decision in Byers *v.* Engles the same question, arising on the same statutes, was decided by the Federal court sitting at Little Rock, and the like conclusions were reached; and that decision was affirmed in this court.

Merrill *v.* Dawson, Hempst., 563.

Fowler *v.* Merrill, 11 How., 375.

This court has often declared the same doctrine as to actual notice.

Black *v.* Zacharie, 3 How., 512.

Bridgewater Iron Co. *v.* Lissberger, 116 U. S., 8.

Mills *v.* Smith, 8 Wall., 27.

In Hitz *v.* National Bank, 111 U. S., 728, the statute provided that deeds, mortgages, etc., should be valid as to creditors and subsequent purchasers from the time they should "be delivered to the recorder of deeds for record, *and from that time only.*" The court held that an unrecorded deed conveyed a right inferior to that of a subsequent execution creditor solely on the ground that the creditor had no notice of the deed.

As the registration statutes relating to mortgages and those relating to deeds were equally rigorous, this decision in Byers *v.* Engles was not based on any process of construction, but on a principle independent of the statutes, applicable alike to conveyances of all

kinds; the principle that a statute made to prevent fraud shall never be allowed to be made an engine of fraud.

There is nothing in the statute of frauds about a part performance; but, as was said in Blakeney *v.* Ferguson, 8 Ark., 278, where the plaintiff has in good faith partly performed an oral contract, "not to decree specific performance, would be to practice a fraud upon him."

Lord Westbury said:

"The court of equity has from a very early period decided that even an act of parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an act of parliament intervenes, the court of equity, it is true, does not set aside the act of parliament; but it fastens on the individual who gets a title under that act, *and imposes on him a personal obligation,* because he applies the act as an instrument for accomplishing a fraud."

McCormick *v.* Grogan, L. R., 4 H. L., 97.

Vice Chancellor Shadwell, in Duke of Leeds *v.* Earl of Amherst, 20 Beav., 239, said:

"I take it that the general wisdom of mankind has acquiesced in this, that the author of a mischief is not the party who is to complain of the result of it; but he who has done it must submit to have the effects of it recoil upon himself. This, I say, is a proposition which is supported by the Holy Scriptures, by the authority of profane writers, by the Roman civil law, by subsequent writers upon civil law, by the common law of this country, and by the decisions in our own courts of equity."

It is true that in Byers *v.* Engles the lien was that of an execution, while here the lien claimed is by attachment. But an attachment is only an execution issued before judgment; and both writs are subject to the same rules.

Grubbs *v.* Ellyson, 23 Ark., 287.

Meadow *v.* Wise, 41 id., 289.

Beard *v.* Wilson, 52 id., 291.

In Byers *v.* Engles, Chief Justice English, an Alabama lawyer by birth and education, dissented, going off on the Alabama doctrine that notice in such cases, in order to be effectual, must be given *before judgment is rendered.*

It must be obvious that Byers *v.* Engles overruled Main *v.* Alexander on every point.

If it was a fraud for a creditor with notice to levy an execution on the property of an innocent third person, the same rule would necessarily apply to an attaching creditor under similar circumstances.

Hannah *v.* Carrington, 18 Ark., 105, came before the court in 1856. There were but three judges on the bench in those days; and Judge Walker, who had delivered the opinion in Byers *v.* Engles, had been succeeded by another judge. Both parties were represented by eminent counsel. Their briefs, printed with the report, show that neither of them referred to Main *v.* Alexander, evidently because it had been overruled, and they knew it. But English, C. J., mindful of his dissent in the previous case, cited Main *v.* Alexander with approval, and thus put that cold snake in circulation again, though the citation amounted only to a *dictum*, as there was no allegation or evidence of notice, and the sale under the mortgage was held to be void on the ground of actual fraud unconnected with the registration laws.

In Jacoway *v.* Gault, 20 Ark., 193 (1859), the mortgage was defectively acknowledged; but was recorded. There was no evidence of actual notice. English, C. J., delivered the opinion, holding that the constructive notice was insufficient. Carnall *v.* DuVal, 22 id., 141 (1860), was peculiar; a mortgage made by agent under power of attorney. The mortgage was recorded, but not the power of attor-

ney, though that was exhibited to the recorder, Carnall. The statute required that both should be recorded. Later Carnall bought under execution, doubtless for a trifle, as he alone probably knew of the defect by reason of his official position; and it was held that he was not bound by the actual notice that he had received. Fairchild, J., who delivered the opinion, expressed his disapproval of the doctrine in Main *v.* Alexander, though the other two judges thought that it ought not to be overruled. In the opinion the court (p. 141) intimate that if there had been a charge of fraud against Carnall it might have been sustained. In Haskell *v.* Sevier, 25 id., 159 (1867), the court held that an unrecorded mortgage was valid as against the estate of the mortgagor and his general creditors. The other cases where Main *v.* Alexander has been cited, are Neal *v.* Spiegel, 33 id., 63 (1878), Martin *v.* O'Bannon, 35 id., 65 (1879), Wright *v.* Graham, 42 id., 141 (1883), Watson *v.* Thompson Lumber Co., 49 id., 85 (1886), Ringo *v.* Wing, id., 458 (1887), Hawkins *v.* Files, 51 id., 417 (1887), Dodd *v.* Parker, 40 id., 539 (1883).

It may be remarked of these cases that in a number of them they went off on other points; and that in none of them did the court repeat the so-called reasons given in Main *v.* Alexander, or substitute any other reason.

Though the doctrine of Main *v.* Alexander has become a rule of property, the court has limited its operation wherever possible. Thus it does not extend to a lien reserved in a deed, or to an equitable mortgage; or free one from the implication arising from recitals in his title papers, and does not apply to a mortgage to the State.

Martin *v.* Schichtel, 60 Ark., 595 (1895).

Stephens *v.* Shannon, 43 id., 464 (1884).

Taliaferro *v.* Barrett, 37 id., 511 (1881).

Memphis R. Co. *v.* State, 37 Ark., 632 (1881).

Nor does it apply where the mortgagee goes into possession.

Applewhite *v.* Harrell Mill Co., 49 id., 279 (1887).

Garner *v.* Wright, 52 id., 385 (1889).

And still a chattel mortgage does not cease to be a mortgage or become a pledge because of the transfer of possession.

1 Pow. Mort., 3.

Not only has the court restricted the dominion of Main *v.* Alexander in various ways; but it has frequently expressed a regret that the decision was ever made.

In Mitchell *v.* Wade, 39 Ark., 386, the court said:

"We should be loth to extend the rule in Main *v.* Alexander, * * * so far as to apply it to a constructive mortgage like this, and *thereby assist in the perpetration of a fraud.*"

In Ford *v.* Burks, 37 Ark., 94, the court said:

"This ruling (as to notice of mortgages) has been on the language of the statute, and has now become a rule of property which cannot be safely disturbed save by the prospective operation of a statute."

In Wright *v.* Graham, 42 id., 148, the court said:

"As long as this court feels constrained to adhere to its ruling in the case of Main *v.* Alexander, 9 Ark., 112, the registration of a mortgage defectively acknowledged conveys no notice; and the mortgage itself is absolutely void as against all the world save parties, even with actual notice."

In Martin *v.* Ogden, 41 id., 192, the court, in reference to Main *v.* Alexander, said:

"These rules have now become so fixed that it would be unwise in this court to attempt their change or modification. Whatever in them there may be incongruous or shocking to a sense of equity, has resulted from efforts to effect legislative intention; and it devolves on the legislature *to bring our equity jurisprudence in harmony with the moral sense of the most civilized peoples.* The simple question

left for us here is, was this mortgage fraudulent, either in fact or by legal presumption?"

This was an appeal for legislative relief.

Mr. Pomeroy says that the rule in Main *v.* Alexander prevails in one or two States.

2 Pom. Eq., sec. 659, n. 1.

As far as we have examined the statutes of other States are so various as to make comparisons useless.

In Ohio, in an early day, the supreme court adopted the rule laid down in Main *v.* Alexander; but the time came when it was looked upon with regret. In White *v.* Denman, 1 Ohio St., 110, the court said:

"If the question involved here had not been determined by adjudication in this State, *and affirmed and adhered to for a number of years*, a majority of this court would feel constrained to take a different view of it."

The theory of absolute presumption of fraud could not be long indulged without exciting the most poignant regrets. The Supreme Court of Pennsylvania said:

"In seeking to catch rogues it is not the proper function of the courts to ensnare honest men. We may become so zealous against fraud as to restrain the free action of honesty; a result that would be most disastrous. Better that many frauds should go undetected than the means of detection or prevention should treat honest men as guilty, or teach men to be always suspicious of their neighbors, and watchful that honest acts be precisely measured according to the standard of legal morality."

Hugus *v.* Robinson, 24 Penn. St., 11.

Cabell, J., said:

"I have found myself compelled as judge to pronounce transactions to be fraudulent and void as to creditors which were known

to be perfectly fair and *bona fide*, and were not intended or calculated to delay, hinder or defraud creditors."

Davis *v.* Turner, 4 Gratt., 471.

Some of the courts kept on in the same old way, consoling themselves by saying:

"Cæsar did never wrong but with just cause."

But other courts found this slavery to an unjust fiction quite intolerable. Such was the case in Virginia. In the case last cited the court overruled the whole doctrine, saying that the conclusive presumption as a test of a fraudulent purpose has no claim to certainty; that on the contrary it concedes its own fallibility by crushing mercilessly the most convincing evidence of fairness and good faith.

This court is sitting here as the court of last resort of the Indian Territory, the welfare of whose inhabitants is now entrusted to its keeping. If the pernicious quality of a rule has, after many years of experience, been verified, and repeatedly proclaimed by the court that made it, shall this court now *ex mero motu* inflict it on a new and helpless population sufficiently tried already?

While limitations have been constantly applied from time to time to the rule in Main *v.* Alexander, the doctrine laid down in Byers *v.* Engles has been repeatedly approved and expanded to meet new cases. In the case of Shinn *v.* Taylor, 28 Ark., 523 (1873), the rule was extended to the case of one holding under an unregistered title bond as against an execution purchaser having notice, given at the time of the sale. (P. 526.) In Jackson *v.* Allen, 30 id., 114 (1875), counsel endeavored in vain to obtain a ruling that notice after judgment was unavailing. The rule in Byers *v.* Engles was extended to one claiming under a *lis pendens* as against a purchaser under execution in Pindall *v.* Trevor, 30 id., 266 (1875). In Atkinson *v.* Ward, 47 id., 540 (1886), it was held that where a purchaser was in possession

of land at the time of a sale under execution such possession was constructive notice against the execution purchaser of whatever title the possessor had. In Tennant *v.* Watson, 58 Ark., 252 (1893), the doctrine of Byers *v.* Engles was extended to all equitable claims.

Byers *v.* Engles has also been approved in the following cases:

Jones *v.* Fletcher, 42 id., 450 (1883).

Wilson *v.* Slaughter, 53 id., 139 (April 12, 1890).

Williams *v.* McIlroy, 34 id., 92 (1879).

Apperson *v.* Burgett, 33 id., 336 (1878).

Doswell *v.* Adler, 28 id., 85 (1872).

IX.

This case falls within exceptions to the rule laid down in Main v. Alexander well recognized by the Supreme Court of Arkansas.

The Supreme Court of Arkansas has made the following limitations in the rule announced in Main *v.* Alexander.

1. An unregistered mortgage is good as against the heirs and general creditors of a deceased mortgagor. In this case neither actual or constructive notice cuts any figure.

Haskill *v.* Sevier, 25 Ark., 152.

2. Where a chattel mortgage has been duly executed and registered in another State where the property at the time is situated, the lien of the mortgage is not destroyed by the removal of the property to this State, though the mortgage be not registered here; and one buying in this State from the mortgagor without notice takes subject to the mortgage lien.

Hall *v.* Pillow, 31 Ark., 32.

3. Conditional sales are not within the statute; and one buying from the vendee, even without notice, acquires no title.

Simpson *v.* Shackelford, 49 Ark., 63.

McIntosh *v.* Hill, 47 id., 363.

McRea *v.* Merrifield, 48 id., 160.

4. The doctrine of Main *v.* Alexander only applies to innocent purchasers for value, including, of course, mortgagees who make advances at the time of the execution of the mortgages, and purchasers at execution sales without notice.

Of course an attaching creditor with notice who has merely secured a lien, cannot stand in any better position than one that has obtained judgment, and has actually bought under it with notice of an outstanding claim.

In Byers *v.* Engles, 16 Ark., 549, the court said:

"That the lien of the judgment is subject to every equity that existed against land in the hands of the debtor at the time of the docketing of the judgment. The lien of the judgment can only operate on the interest which the debtor had at the time of its rendition. The judgment creditor is entitled to the debtor's real interest alone, subject to his equities as they existed at the date of the judgment. A lien amounts to but a security against subsequent purchasers and encumbrancers."

In the case of Moore *v.* The City of Little Rock, 42 Ark., 66 (1883), the facts were these:

The plaintiffs had a mortgage on a tract of land adjoining the City of Little Rock. Afterwards the mortgagee laid the land off into lots and blocks, and annexed them to the city. The mortgagors then foreclosed their mortgage and bought in the land. The city levied a tax on the lots and blocks as thus laid out, claiming that the streets had been dedicated to the city; and the plaintiffs brought a suit to enjoin the collection of the tax on the ground that they were not bound by the platting of the lands and the dedication of the streets by the mortgagee.

It appeared that the mortgage, though recorded, had not been legally acknowledged; and the city claimed that the mortgage was void as to it. But the court said:

"The defect in the certificate of acknowledgment is a matter with which the city has not the remotest concern, and of which it can take no advantage. It was not a purchaser for value."

The same principle had been previously announced in the case of Hill *v.* Coolidge, 33 Ark., 626 (1888), where, in speaking on this question, the court said:

"To this (the argument that the appellants were innocent purchasers) it may be answered that, they purchased at their own execution sale, and therefore were not, nor did they claim to have been, innocent purchasers; and no question as to notice arises in the case."

In Taylor *v.* Mississippi Mills, 47 Ark., 252 (1886), the court reaffirmed this doctrine, saying, "as against a deceived vendor an attaching creditor of a fradulent vendee is not an innocent purchaser for value."

In Ames Iron Works *v.* Kalamazoo Pulley Co., 63 Ark., 87 (1896), the court made the same ruling, saying:

"The consideration of a pre-existing debt, while good between the parties, will not bring the purchaser within the rule which protects him as a purchaser for value against one having superior equities."

The court also said:

"Certain *dicta* in other cases where this question was not involved have encouraged counsel to say that the rule they contend for has been expressly recognized by this court. * * * But the question under consideration is now for the first time squarely presented; and we conclude that the doctrine announced in the beginning of this opinion is more in accord with reason and justice, and is supported by abundant authority."

In Willams *v.* McIlroy, 34 id., 92 (1879), the court said:

"Appellee purchased under his own execution, parted with nothing on his bid, and was not an innocent purchaser for value without notice."

In Tennant *v.* Watson, 58 Ark., 252, the court reviewed all of its previous decisions at length, and declared, referring to and confirming the doctrine in Byers *v.* Engles, that a purchaser of property under execution in his own favor takes it charged with all the rights and equities which might be asserted against the defendant in the execution of which he had notice before the sale.

The court said:

"Apellants *purchased at a sale under a judgment in their favor,* and are therefore not innocent purchasers for value, *and acquired nothing.*"

The ruling in Newman *v.* Davis, 24 Fed. Rep., 612 (1885), on this point, right in every other respect, has not been followed by the Supreme Court of Arkansas.

It is very clear that the court in Watson *v.* Thompson Lumber Company, hereafter referred to, did not intend to overrule this principle.

The court reached the same conclusion in the cases first cited that was announced by this court in People's Savings Bank *v.* Bates, 120 U. S., 556. It was urged in the court below that the case of Ames Iron Works *v.* Kalamazoo Pulley Company should not be considered because it was decided after the extension of the Arkansas statutes over the Indian Territory. That might be true if the decision in that case had made any change in the existing law; but it did not. It simply recapitulated previous decisions, and rested the result on the doctrine announced in Moore *v.* Little Rock and previous cases.

In Ober *v.* Gallagher, 93 U. S., 207, the court, in order to ascer-

tain the settled rule of property in Arkansas, referred to and cited a statute passed long after the contract was made, and after the suit was commenced, though the statute was not retrospective, and disregarded a recent State decision not in line with others on the same point.

But suppose that we admit that the court should not consider Ames Iron Works *v.* Kalamazoo Pulley Co., what is the result? Only that the attachment creditors find themselves in no better attitude. Certainly Moore *v.* Little Rock has never been overruled; neither have the other cases on this point except Main *v.* Alexander. If the attaching creditors discard the case last mentioned, they must go back to Pindall *v.* Trevor, 30 Ark., 266 (1875), Pickett *v.* Merchants National Bank, 32 id., 369 (1877), Watkins *v.* Trapnall, 15 Ark., 73, and Jones *v.* McDowell, 42 Ark., 422 (1883), and to Byers *v.* Engles where it was held broadly that "a purchaser at execution sale, to which the rule of *caveat emptor* applies, gets no warranty of title by his deed; but takes the estate encumbered with all the equities upon it at the time of his purchase." This leaves the question of notice, actual or constructive, quite out of the case.

If there could be any doubt about our position that an attaching creditor in Arkansas is a mere volunteer, it will be dissipated when we come to consider hereafter cases in which courts of chancery correct mistakes.

It would seem to be undoubtedly the law that an attaching creditor is only a volunteer; necessarily so, for if he gets judgment eventually, and buys under it, and the judgment is reversed on error, he gets no title.

Fishback *v.* Weaver, 34 Ark., 569.

Boyd *v.* Roane, 49 id., 416.

Bank U. S. *v.* Bank of Washington, 6 Pet. 19.

The reason of the rule that a purchaser at an execution sale

holds free from claims of which he has no notice at the time of his purchase, is that it is desirable to encourage purchasers, so as to make the property bring as much as possible. This motive has no application to an attachment before sale.

X.

As to the rule that when a statute is borrowed from another jurisdiction the legislature is presumed to have intended to adopt decisions previously made construing it.

The force of the rule cannot be measured by any exact standard. It would seem to be weakened where a whole code is re-enacted, and where the adjudicatd cases are so numerous that a presumption that they were all in contemplation of the legislative mind would be unreasonable. Thus in 1868 the legislature of Arkansas re-enacted the Civil Code of Kentucky, which in that State had received a very technical construction. In Holliday *v.* Cohen, 34 Ark., 716, the court held that it was not bound by the Kentucky decisions. It not unfrequently happens that statutes recently passed receive a construction that is belied by more ample experience; and yet decisions known to be erroneous continue to be applied with undiminished rigor because they have become rules of property. In a new statutory domicile, the doctrine that we are considering is not strengthened by the rule of *stare decisis.*

Hunter *v.* Truckee Lodge, 14 Nev., 37.

The adoption of a system of laws in this manner affords a valuable opportunity for revision and selection, which fortunately was not neglected when the American courts took over the laws of England. Decisions that had been found to be more productive of evil than of good were discarded; as in the case of mortgages created

by deposit of title papers; a doctrine the establishment of which Lord Eldon had deprecated in Whitehead, *ex parte*, 19 Vesey, 209, and in other cases. The rule of course will not be followed where the court having it under consideration would overrule the construction of the borrowed statute if it had been previously made by itself. Morgan *v.* State (Neb), 71 N. W., 794.

Where a decision has not become a rule of property, and is palpably wrong, it can hardly be expected that an intelligent court will follow it.

The rule in question is much less imperative than that which constrains the federal courts to follow the decisions of the State courts in the construction of State statutes; because the latter rule rests upon a statutory command.

The State decisions are not followed unless a rule of construction has become settled.

Pease *v.* Peck, 18 How., 599.
Burgers *v.* Seligman, 107 U. S., 33.
Roberts *v.* Bolles, 101 id., 128-129.
Penn *v.* Bowler, 107 id., 541.
Ober *v.* Gallagher, 93 id., 207.

There are no contradictions in nature; and whenever two decisions are in palpable contradiction one or the other must necessarily be wrong.

In Gelpcke *v.* Dubuque, 1 Wall., 176, it was held that the federal courts will not necessarily follow decisions which may prove but oscillations in the course of judicial settlement of the law. In that case the court said:

"We are not unmindful of the importance of uniformity in the decisions of this court and those of the highest local courts to the constitutions of their own States. It is the settled rule of this court in such cases to follow the decisions of the State courts. But there

have been heretofore in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice and the law because a State tribunal has erected the altar and decreed the sacrifice."

In Whitney *v.* Fox, 166 U. S., 647, the court said:

"While it is the ordinary rule to accept the interpretation given to the statute by the courts of the country by which it was originally adopted, the rule is not an absolute one, to be followed under all circumstances."

This court expressed itself very fully on this subject in Butz *v.* Muscatine, 8 Wall., 582, as follows:

"There are several adjudications of the highest court of the State more or less adverse to the views we have expressed. We do not deem it necessary more particularly to advert to them. Entertaining the highest respect for those by whom they were made, we have yet been unable to concur in the conclusions which they announce. It is alike the duty of that court and of this to decide the questions involved in this class of cases, as in all others, when presented for decision. This duty carries with it investigation, reflection and the exercise of judgment. It cannot be performed on our part, by blindly following in the footsteps of others, and substituting their judgments for our own. Were we to accept such a solution we should abdicate the performance of a solemn duty, betray a sacred trust committed to our charge, and defeat the wise and provident policy of the constitution which called this court into existence.

"Our duty depends upon the questions involved, and not upon the channel through which the case comes before us. Where the settled decisions in relation to a statute, local in its character, have become rules of property, these remarks have no application. In such cases this court will, as it has always done, follow such adjudications.

The cases of a different character, involving State statutes, in which the adjudications of the courts of the States in relation to them have been departed from by this court, extend in an unbroken series from an early period after its organization to the present time."

One of our positions is that under the registration laws, actual notice, when undisputed, is equiqalent to registration; a rule not dependent on the niceties of statutory construction, but on a salutary principle of equity of universal application. The question might have been answered either one way or the other. Unfortunately the Supreme Court of Arkansas has answered it both ways. We wish to be plainly understood as saying that in our view *the question is not one of statutory construction, but is one of general jurisprudence.*

XI.

Where the statute does not provide for the registration of a particular species of written instrument, such instrument, being outside of the statute, is nowise affected by it.

This would seem to be a truism; but it was not so decided in Watson *v.* Thompson Lumber Company, 49 Ark., 85 (1886). Of course there are many instruments, such as bills of sale, that are not within the registry acts.

The statute relating to the recording of mortgages as first enacted in the Revised Statutes was as follows:

"All mortgages, whether for real or personal estate, shall be acknowledged before some person authorized by law to take the acknowledgments of deeds, and shall be recorded, if for lands, in the county or counties in which the lands lie; and if for personal property in the county in which the mortgagor resides."

Revised Statutes, Ch. 101, sec. 1.

This statute was amended March 1, 1877, so as to read as follows:

"All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner as deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded,—if for lands in the county or counties in which the lands lie;—and, if for personal property, in the county in which the mortgagor resides."

Acts 1877, p. 17.

Mansfield's Digest, sec. 4742.

It will be observed that this statute makes no provision for recording mortgages of personal property where the mortgagor does not live in the State.

That this was a merely casual oversight is apparent enough. There could be no motive of public policy in forbidding nonresidents to mortgage personal property lying within the State; a fact that is distinctly manifest because when attention was called to the defect the State legislature and the Congress of the United States both promptly intervened for the purpose of supplying the omission.

Notice seems not to have been called to this defect until the case of Watson v. Thompson Lumber Company came before the courts. In that case the Thompson Lumber Company was a foreign corporation doing business in Clay county, Arkansas. It executed a mortgage to McMillion & Ebbert on lands and personal property situated in Clay county, where it was doing business; and the mortgage was duly recorded in that county. Creditors of the corporation recovered judgment against it, and sued out executions which were levied on a part of the personal property. McMillion & Ebbert assigned their claim and mortgage to Watson, who brought a suit to foreclose, making the creditors defendants.

The court held that as there was no statute providing for the

recording of a mortgage of personal property executed by a nonresident, the registration in Clay county did not create a lien; and that the claim of the execution creditors was superior to that of the assignee of the mortgage as to the personalty included in it.

Attention having thus been directed to this anomalous condition of the law, the legislature on the 5th day of February, 1891, amended the statute last above copied by adding these words:

"*Provided,* That if the mortgagor is a nonresident of this State the mortgage shall be recorded in the county in which the property is situated at the time the mortgage is executed."

Acts 1891, p. 6.

Sandels & Hill's Digest, sec. 5090.

By act of Congress of February 3, 1897, it was enacted as follows:

"Section 4742 of Mansfield's Digest of the laws of Arkansas, heretofore put in force in the Indian Territory, is hereby amended by adding to said section the following: *Provided,* that if the mortgagor is a nonresident of the Indian Territory the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated."

Stats. 1896-1897, p. 510.

For the present we will defer the consideration of these two statutes, and will direct our attention to the decision in Watson *v.* Thompson Lumber Company. An abstract of the brief for appellant is included in the report, showing that the case went off on points not argued. That it was wrongly decided is a proposition that, we think, admits of demonstration. We have referred with some care

to the cases cited in the opinion; and find that none of them is in point. Now let us notice them.

In Stewart *v.* Platt, 101 U. S., 735, the statute of New York provided that a chattel mortgage should be filed in the town or city where the mortgagor, if a resident of the State, should *reside* at the time of its execution. The mortgagors resided in Westchester county; but were doing business in the city of New York, where the mortgaged property was situated. The mortgage was filed for record in New York, and not in Westchester county. Following New York decisions the court held that the claim of the mortgage was inferior to that of judgment creditors who had obtained liens. The statute in that case expressly provided that *"every mortgage which should not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged should be absolutely void as against" creditors and purchasers,* unless filed for record as prescribed in the statute.

There is no such statute in Arkansas; and the law is just the reverse. But there is another important difference. By the Arkansas statute the case of a mortgage of chattels situated in the State belonging to a nonresident was wholly omitted; but the New York statute provided that where the mortgagor was a nonresident the mortgage might be recorded in the county or town in which the property was situated. And as this statute was not complied with, and the property was not delivered to the mortgagee, by the very terms of the statute it was void.

In Cook *v.* Hager, 3 Colo., 386, the statute required that a chattel mortgage should be acknowledged "before any justice of the peace, in the justice's district in which he (the mortgagor) may reside." As the mortgagor, a foreign corporation, did not reside in the State, it was held that though the mortgage was acknowledged before a justice of the peace of Colorado, it was improperly admitted

to record, and hence that the registration did not operate as constructive notice. There was no evidence of actual notice. But by statute in Colorado it is provided that "No mortgage on personal property shall be valid as against the rights and interests of any third person or persons unless possession of such personal property shall be delivered to and remain with the mortgagee, or the said mortgage be acknowledged and recorded."

Gen. Stat. Colo. 1883, sec. 163.

In Colorado, as in Arkansas, when the defect in the statute was discovered it was amended.

Id., sec. 164.

De Courcey *v.* Collins, 21 N. J. Eq., 359., is nowise in point. The statute in that case provided where a mortgage executed by a nonresident should be recorded, and there was no evidence of actual notice.

In Smith *v.* Moore, 11 N. H., 63, the statute as to nondelivery was similar to that of Colorado; so stated in the opinion; and there was evidence of non-delivery. In Bither *v.* Buswell, 51 Me., 601, the statute required the mortgage to be registered in the county in which the mortgagor resided; it was not shown where he resided; and there was no evidence of actual notice. Briggs *v.* Leitelt, 51 Mich., 79 was a similar case.

In none of these cases, except in the Colorado case, was there a failure to denote a place for the registration of mortgages executed by nonresidents; and the decision in Colorado too went off on a statute for which in Arkansas there is no equivalent, or on the ground that there was no actual notice.

In Arkansas nondelivery of property mortgaged never raised even a *prima facie* presumption of fraud.

In the very nature of things it would seem that one who could not record his mortgage because the law would not allow him to

do so, could not be convicted of fraud by the law for not recording it. The contrary proposition would seem to be the height of absurdity.

St. Paul said, "Where there is no law there is no transgression —*ubi enim non est lex, nec praevaricatio.*" Ep. ad Rom., IV-15. Doubtless Gamaliel knew that. Did not this court in Conard *v.* Atl. Ins. Co., 1 Pet., 386, say that one was not required to deliver a ship which was off at sea? If the law does not require one to perform impossibilities, it should not punish him for not having performed them.

Indeed the judge who delivered the dissenting opinion in the court below quotes from the opinion in Calder *v.* Bull, 3 Dallas, 388, "A law that punishes a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law," "is manifestly unjust."

A great jurist on a memorable occasion said: "Where there is no law applicable there can be no judgment; where there is no judgment, there can be no condemnation."

But the decision in Watson *v.* Thompson Lumber Company concerns us but little. It did not join in the stately procession of the Arkansas statutes into the Indian Territory. *It was not based on any statute; but on the absence of a statute.*

XII.

In Arkansas in case of a sale of personal property its non-delivery to the buyer does not raise a conclusive presumption of fraud.

The statutes of the different States are extremely diverse. In some of them various periods of time are allowed for registering conveyances. In some a failure to register or deliver possession avoids, while in some States registration does not dispense with delivery. Under some of these statutes actual notice counts for nothing. Where non-delivery is conclusive evidence of fraud, and registration is also required, and there is no registration, or a defective registration, then if there is no delivery, the conveyance is void, notice or no notice.

It is well known that this doctrine as to the legal presumption of fraud *in case of a sale* based on mere non-delivery of the thing sold, once prevailing extensively in this country, and still extant in some of the States, was based on a mistaken reading of the opinion of Buller, J., in Edwards *v.* Harben, 2 Term, 587, by American courts.

Notes to Twyne's Case, 1 Smith's L. C., 33.

Benj. Sales, Bennett's Ed., secs. 485, 489.

Bump Fraud. Conv., p. 61.

It is well settled in Arkansas that non-delivery of the thing sold does not raise a legal presumption of fraud; but that it is only a circumstance that may be explained either way.

Field *v.* Simco, 7 Ark., 269.

Cocke *v.* Chapman, id., 197.

Adler-Goldman Co. *v.* Phillips, 63 id., 51.

Valley Distilling Co. *v.* Atkins, 50 id., 291.

Hempstead *v.* Johnson, 18 id., 134.

In Martin *v.* Ogden, 41 Ark., 192, the court said:

"The more modern and better doctrine is that this is a presumption of fact, and that no conclusive legal presumption arises from

the fact that the vendor remained in possession; and that even such a presumption of fact does not necessarily arise where the possession accompanies or follows the deed, or where there is a mere mortgage. It is a question for a jury, or, in equity, for the chancellor, under all the circumstances."

The decision in Huntley *v.* Kingman, 152 U. S., 527, and cases cited in the opinion, render further argument superfluous. Indeed, the whole matter, as far as the federal courts are concerned, was settled in Warner *v.* Norton, 20 How., 459, and in Smith *v.* Craft, 123 U. S., 436.

XIII.

The failure to deliver the mortgaged property to the mortgagee did not avoid the mortgage by any rule of the common law.

The English cases on this subject are very fully and carefully collated in Bump on Fraudulent Conveyances, page 61 *et seq.* The only deficiency or defect that we have found in this review is that in speaking of Ryall *v.* Rolle, 1 Atk., 165, the author fails to state that the decision was based on the statute of 21 James I., c. 19, which was a bankrupt law; and not on the common law, or the statutes of Elizabeth, sometimes said to be declarations of the common law.

This statute was never in force in Arkansas.

Mansfield's Dig., sec. 566.

It is certainly a well known fact that at common law non-delivery of property mortgaged to the mortgagee did not raise even a *prima facie* presumption of fraud. It was not a badge or indication of fraud; and of itself was wholly without significance.

In Edwards *v.* Harben, Buller, J., said:

"But if the conveyance be conditional, there the vendor's con-

tinuing in possession does not avoid it; because by the terms of the conveyance the vendee is not to have the possession till he has performed the condition."

2 Term., 595.

1 Powell Mortg., 33 a.

Under the local law the mortgagee is not entitled to possession until breach of condition.

Fitzgerald *v.* Beebe, 7 Ark., 319.

Ringo *v.* Woodruff, 43 id., 489.

The decisions on this subject so far as they relate to non-delivery of property mortgaged to secure future payment are entirely harmonious. Mr. J. Story, in Conard *v.* Ins. Co., 1 Pet., 449, said:

"But in cases where the sale is not absolute, but conditional, the want of possession, if consistent with the stipulation of the parties, * * * has never been *per se* a badge of fraud. The books are full of cases on this subject."

The same judge in Meeker *v.* Wilson, 1 Gall., 419, said: "An exception to the rule is where the possession of the grantor is consistent with the deed."

So in Phettiplace *v.* Sayles, 4 Mason, 312, Mr. J. Story said:

"The possession therefore must be inconsistent with the sale, and repugnant to its terms or operation, before it raises a presumption of fraud."

In Fowler *v.* Merrill, 11 How., 394, the court say that "it is more customary in all mortgages for the mortgagor honestly to retain the possession than to pass it to the mortgagee. And in conditional sales, especially on a condition precedent *bona fide*, the vendor, it is usually considered, ought not to part with the possession till the condition is fulfilled."

In U. S. *v.* Hooe, 3 Cranch, 89, C. J. Marshall said:

"But the difference is a marked one between a conveyance which

purports to be absolute, and a conveyance which, from its terms, is to leave the possession in the vendor. *If, in the latter case, the retaining of possession was evidence of fraud, no mortgage could be valid. The possession universally remains with the grantor until the creditor becomes entitled to his money, and either chooses or is compelled to exert his right.* That the grantor is to receive the rents and profits till the grantee shall become entitled to demand the money which the deed is intended to secure, is a usual covenant."

In Hamilton *v.* Russell, 1 Cranch, 316, C. J. Marshall said:

"The distinction they (the cases) have taken is between a deed purporting on the face of it to be absolute, so that the separation of the possession from the title is not incompatible with the deed itself, and a deed made upon condition which does not entitle the vendor (vendee) to immediate possession."

In Hempstead *v.* Johnson, 18 Ark., 134, the court said:

"This court has adopted the rule that possession by the vendor subsequent to the sale does not amount to fraud *per se*, but is merely *prima facie* evidence of fraud, subject to be explained. But this rule does not apply to mortgages and deeds of trust where the grantor by the terms of the deed is permitted to retain possession of the property until default of payment, because in such transfers the possession is consistent with the deed, and furnishes no evidence of fraud. * * * It would seem from these authorities that if the time fixed for payment and sale upon default be reasonable under all the circumstances, fraud is not to be inferred."

So far as we know there is no conflict among the cases on this subject.

Jones, Chat. Mortg., sec. 323.

There are, however, statutes in two or three States changing the law in this respect.

Of course cases where mortgaged property is left with the mort-

gagor with permission to use, sell and re-invest, and cases of secret trusts, as in Lukens *v.* Aird, 6 Wall., 78, and other cases of that sort are different.

It was never held in Arkansas that in any case it must be shown that possession was delivered to the mortgagee. That doctrine, once prevailing in New York, and there found to be utterly oppressive and unjust (see opinion of Dickinson in Stoddard *v.* Butler, 20 Wend., 544, and Bump Fraud. Conv., ch. V, p. 61), was entirely repudiated in Arkansas. What the supreme court of that State hold is that possession by the mortgagee is constructive notice to creditors and purchasers; not that it is fraud not to take possession.

XIV.

The decision in Main v. Alexander ought not to be imposed on the people of the Indian Territory, because:

It is manifestly wrong in principle, and is in violation of the statute. Unjust decisions have no doubt often been made; but it is not often that parallel rulings by the same court, running over a long series of years, in which one denounces as wrong what the other solemnly declares to be right, can be found.

From the regrets that have been expressed it is clear that if the Supreme Court of Arkansas were now to pass on the question as *res nova* the decision would be different.

The conclusion in Main *v.* Alexander was reached by the twofold process of putting a wrong construction on one section of an act, and overlooking another section of the same statute, which by unmistakable language was decisive of the controversy. A very technical construction was placed on the only section considered.

Almost all of the cases decided in accordance with the ruling in Main *v.* Alexander—and that case as well—have been cases where

the mortgagee was not morally at fault; where some officer had blundered in writing a certificate which rendered the registration ineffectual; and where some one was willing to obtain advantage of a technical defect in a manner proclaimed in Byers *v.* Engles and the long line of cases based on it to be iniquitous and unjust. It has long been the settled law that statutes intended to prevent fraud shall never be used as instruments for the perpetration of fraud. This is known to the legislatures in England and America; and in no case, so far as we have learned, has the rule ever been assailed or restricted by the legislative power. It was well said in Byers *v.* Engles, p. 550, "and so permanently has this construction been settled * * * that to change the construction given by the courts would, in effect, be changing the law itself."

Within our own time by radical change in civil procedure the theory that all laws and rules must be literally and technically construed has been banished from its most ancient fortifications and stronghold. The truth is that the doctrine of strict construction has never been applied, and can never be applied consistently.

Doles *v.* Hilton, 48 Ark., 305.

As we have seen, the Arkansas court has made many exceptions from the doctrine announced in Main *v.* Alexander. Nevertheless it has immolated the rights of a considerable number of men and women that ought to have been considered as sacred when judged by the very standard of good faith which it had made, and has perpetuated down to this hour. These victims were thus punished "not for any good or harm that they had done;" but on grounds of public policy. We suppose that the custom of human sacrifices was ordained and continued for the same reason. And by the same reasoning it ought never to have been abolished; but ought carefully to be transplanted to all new colonies.

No man can serve two masters; and the court cannot consistently

adopt both Byers *v* Engles and Main *v.* Alexander. They are as opposite as the poles. Nor should the court, under the rule above referred to, inflict on the Indian Territory a doctrine that has been tried in Arkansas, and has been discredited by the court in which it had its origin. We have read that traders among the Indians—and even sometimes Indian agents—have been known to sell shoddy goods to them, on the principle that "anything is good enough for the Indians;" but perhaps they would have hesitated to impose on them for a perpetual inheritance the mutilated remnant that is now left of Main *v.* Alexander.

There is not only an inconsistency in holding that in the case of deeds actual notice is equivalent to registry, and that this rule does not apply to mortgages, but also in saying that in case of mortgages possession, which is merely construçtive notice, a mere inference, in its nature fallible, is sufficient, while the undisputed fact of notice is not sufficient, except in the case of mere volunteers. The object of the registration acts is publicity; and any one who admits full notice cannot complain of want of publicity. Taken as a whole the decisions are neither harmonious nor satisfactory. The game is so muddled that we must begin again. It is the *statutes* that are adopted for the Indian Territory; and the decisions are quite subordinate.

We all know whence the decision in Main *v.* Alexander was imported. It is a part of the scoria of an extinct volcano in New York now happily extinct. It was there held that non-delivery of personal property sold raised a *conclusive* presumption of fraud. No evidence was admissible to show the real facts; although the courts were continually proclaiming that fraud would NEVER be presumed, but must be satisfactorily proved. No such doctrine of *conclusive* presumption could be traced to English law of any period, or to any other code of laws; but it was long defended with a zeal that truth rarely enlists.

In the first half of the nineteenth century the courts of New

York exercised a preponderating influence over the jurisprudence of the States of the South and West. When this question was presented judges dropped a citation of a New York case, and passed on. Nothing is so attractive as a paradox which saves all the trouble of thinking. If it had not been for the stand taken by this court the rule would probably have swept the whole country.

In a few of the States fanatical lawyers, possessed of more zeal than discretion, secured the passage of acts along the same line, but still more atrocious. We say lawyers, because it is not probable that the average layman would know anything about such an artificial and technical rule; and fishes do not make nets.

What is noteworthy about the ruling in Main *v.* Alexander and other cases of that sort, is the subordination of the innocent purchaser to the creditor. Compared with the creditor the innocent purchaser was *persona non grata.* He was assigned a position below the salt; a poor man at a frolic, made to feel his inferiority, the butt of insolent jests, and in the end stripped of his clothing, and turned out into the streets to taste the aroma of the wintry blasts, his virtues weighing nothing against his poverty; condemned on a single fact, and unheard.

The debtor was placed in a sort of legal *reconcentrado* where a different code of laws, having no existence for others, was applied. What in others was lawful and even praiseworthy, was in him a crime; and it was dangerous to have any dealings with him.

In Doane *v.* Eddy, 16 Wend., 523, an itinerant minister of the gospel had become indebted to the extent of $175, for which he gave a bond with a surety, executing to the latter a mortgage on a mare, with an agreement that he should have the use of the mare until default, so that he could continue to prosecute his calling. The debt had most likely been incurred by the preacher to keep soul and body together, or to keep his family from starving. Anyway by pursuit

of an unremunerative profession he had become completely demonetised. The agreement for retention of possession was not secret. A creditor to whom the minister owed $36.75, *with full knowledge of all of the facts,* attached the mare; and it was held by a majority of the court that the mortgage was a damnable fraud that must be stamped out; a sufficient admonition as to the wickedness of trying to reform this evil world on a small capital. The minister thus denounced as a fraud might have remembered that many pure minded and good men had taken on themselves vows of poverty; and he must have read over somewhat ruefully the parting injunction to his predecessors to put neither silver nor brass in their purses. But the majority of the court evidently concluded with John P. Robinson that "they didn't know everythin' down in Judee;" and, having squelched this impecunious preacher and his benighted friend and accomplice under the planetary weight of the law, the judges slept soundly, lulled to their slumbers with the consciousness of duty performed. It is gratifying to know that C. J. Nelson dissented.

It was a fraud in the mortgagor to keep temporary possession under any circumstances whatever; though by the terms of the statute quoted in the opinion of the majority in Doane *v.* Eddy the persons claiming under the conveyance might show that "the same was made in good faith, and without any intent to defraud creditors;" and notwithstanding the fact that without any special agreement this forlorn itinerant was by law entitled to the possession of his mare until condition broken.

Waring *v.* Smith, 2 Barb. Chy., 119.

No more desolating rule was ever invented. It debauched the creditor by requiring him to act the part of a Shylock, and to steel his heart against the pleadings of innocence and poverty; rewarded him by confiscating the property of inoffensive third persons, and by

condemning them unheard. No cast-iron rule was ever enforced with such unrelenting severity.

It was even insisted that it ought to be enforced where delivery was impossible.

Butler *v.* Van Wyck, 1 Hill, 456.

It was in truth one of the most terrible proofs of the delirium which a desire to defend the rights of property has ever introduced into the law. It is hardly possible to imagine a more palpable effect of that materialistic reasoning which considers individual men solely in reference to their utility to creditors. The courts established a sort of inverted civil service rule to reward scoundrels, who, prying into records in order to discover latent defects, were always prowling around seeking to rob of his property someone who owed him nothing, and who in the honesty of his heart supposed that an act of kindness and charity was not a crime, since it could harm no one; or who was the made victim of casual omissions which had occasioned no loss or detriment to his greedy and vindictive pursuer. Under pretence of suppressing frauds the courts rewarded them; treating the attaching creditor as an accomplice turned State's evidence; and as a generous recompense for his compunction and fidelity to dishonest principles they bestowed on him all of the property in controversy, gave him absolution and applause, and thrust his adversary out of court with anathemas and condemnation.

History tells us that when the King of France, during the dark days of religious fanaticism, sent soldiers out to destroy certain villages inhabited by heretics, their commander asked a certain ecclesiastic how he could distinguish heretics from the orthodox, when the latter said: "Kill them all; God will know his own!"

The story is probably not true. But whenever the courts concoct a rule that arbitrarily shuts off inquiry, and must often sacrifice the

innocent, they act on the principle thus indicated, minus the trust in God.

It made no difference that the rule was constantly working the most outrageous injustice by shutting off the light. Criticism provoked resentment and dogmatism until the courts seemed to regard it as clothed with the highest sanctions of religion, adhering to their nostrum with grim tenacity, though justice was generally immolated.

On this subject Senator Daniel S. Dickinson in Stoddard *v.* Butler, 20 Wend. 545, said:

"Neither the legal nor the moral code should be administered for the sole benefit of creditors. They become creditors by their own volition, and have abundant means for their own protection; nor can I consent to place the general creditor upon a superior footing to him who furnishes his poor neighbor with a cow to nourish his children, or a team to sow his crops or gather in his harvest. If the commercial interests of this country cannot be sustained without trampling upon all others, and the ordinary charities of life besides, the sooner it finds its level the better. It is an ideal dream to suppose we can advance the cause of morals by establishing a rule which ministers to the mercenary passions at the expense of the benevolent affections, or that the fountain of justice will send forth purer streams if they are forced to flow through artificial channels. * * * *

"In *Randall v. Cook,* Mr. Justice Bronson says, 'Had it been declared fifty years ago, that if a man conveyed his personal chattels and still kept them himself under any pretence whatever, the transaction should be deemed absolutely fraudulent and void as against creditors and purchasers, it would have saved an incalculable amount of time and money which have been expended in the litigation of questions of this kind; and it would moreover have rendered a most important service to the cause of good morals, by removing all tempta-

tion to the numberless frauds which have been committed for the purpose of placing property beyond the reach of legal process.' While I acknowledge the force of reasoning adopted by the learned and esteemed judge, I am compelled to remark that if at the same time the law had laid its interdiction upon all human intercourse as to exchange or purchases of property the same result would have been produced, and with about equal justice and propriety. If fifty years ago the law had laid aside its metaphysical subtleties, and revealed itself in its own simplicity and purity—if it had, regardless of form, pronounced appropriate judgments upon honesty and fraud, it would have won more by its justice than it has terrified by its power. There cannot be two standards of truth and morals—the one for the courts of justice and another for the people in their ordinary intercourse. If by the inquisitions of the judicial crucible, a transaction both honest and fair may be alloyed until it is dishonest and fraudulent, by the inverse power of transmutation a fraud may be refined until it is equivalent to honesty and truth. If truth may become constructive falsehood, by the same rule falsehood may become constructive truth. If the *possession* of personal chattels is, or ought to be *conclusive* evidence of ownership, it is also, or ought to be *conclusive* evidence that a person *not in possession* is *not the owner*. All, then, that remains for the fraudulent debtor to do, who would *conclusively* place his chattels beyond the reach of execution, is to place them in the *possession* of his friend against whom no process has been issued, and it is done.

"It was said by counsel upon the argument of this case that the rule contended for by the appellants would tend to produce and encourage litigation and multiply suits, and for this reason should be upheld by the legal profession; that its adoption would tend to to make expense and delay in the collection of debts, while the reverse would be productive of much utility and economy. It may be

said with equal propriety that if our system of jurisprudence was exchanged for the arbitrary laws of the East; if our courts and juries were dispensed with, and justice measured out by the nod of the lawgiver, and executed by the baston and bowstring, our administration of justice would be more summary as well as more economical, and the service of the legal profession might be altogether dispensed with."

It is well known that Judge Bronson took offense at this language; and without reason; for whenever the time comes that any principle of law is not the subject of legitimate criticism then we shall have reached that last state of decrepitude and stagnation towards which, according to some thinkers, we are inevitably tending, and which we shall attain when we shall have exhausted all possible combinations.

No doubt Judge Bronson was a very able and a very honorable judge; but neither genius, talents, learning, virtue and the best intentions, or all of them together, can protect the human mind from the most deplorable errors. The feebleness of his rejoinder in Butler v. Van Wyck, 1 Hill, 450, betrayed the weakness of his cause. He disposed of the objections made by Dickinson by calling them "witty comments." There it was again; ending controversy by calling things by wrong names!

There is another New York case that deserves honorable mention. A man lent a carriage to a debtor, and it was attached by a creditor, contending that the bailment was in law necessarily a fraud. The lawyer who started this contention was a better logician than Aristotle. If it was a fraud under any and all conceivable circumstances for one who had bought chattels from a debtor to leave him temporarily in possession, thus giving him a false show of credit, it must be equally fraudulent to lend him chattels whose possession would have precisely the same effect. The court, however, escaped

from the Caudine Forks by saying *"Distinguo,"* and that the bankrupt act of Jac. I, c. 19, did not quite reach the case.

Craig *v.* Ward, 9 Johns., 197.

The legislature cannot deprive anyone his property simply by calling things by wrong names. It may tax privileges; but it cannot say that it is a privilege for a man to eat his dinner, and then tax him for that. It cannot, under any pretence, take away the property of A and give it to B. How then can the courts do the same identical thing by calling that a fraud which everyone knows is not a fraud? Men whose thoughts are completely polarized by passing through a technical and highly artificial medium may revel in a world of phantoms of their own creation; but the cause of justice should not be allowed to suffer thereby.

The court in Main *v.* Alexander, seeing that the courts of New York, presided over by judges eminent for learning and ability, had found an easy rule of the thumb for deciding cases without inquiring into the facts, simply followed their illustrious example, only applying it to registration, and not to possession.

We have said that Byers *v.* Engles overruled Main *v.* Alexander. It was again overruled when the same court said that non-delivery did not raise a conclusive presumption of fraud. It was again overruled when the court held that the rule had no application to mere volunteers; and that an attachment or execution creditor even after sale was only a volunteer, not being an innocent purchaser.

It was overruled again when the court held in Excelsior Mfg. Co. *v.* Owens, 58 Ark., 556, that of two opposing presumptions that of innocence would prevail.

It was again overruled when the court declared repeatedly that fraud is *never* presumed. We do not say that the decisions are uniform. What we do say is that the decision in Main *v.* Alexander is harsh, unjust, oppressive and unreasonable; based on no sound prin-

ciple; that it has been so declared repeatedly by the court that made it; and that it is not worthy of perpetuation even for the government of Indians not taxed.

We say that our system of laws rests on a natural sense of justice more or less recognized by all men; and that it is the highest duty of all of the departments of the government to see that these two do not part company. When men substitute names for things, words for thoughts, and counters for words, the connection dissappears; and gross injustice is the result.

We can imagine a refined, cultivated and upright man, utterly ignorant of courts and of legal procedure, who, finding himself in a courtroom for the first time, might there listen to a litigant saying to learned judges, "The question turns on my knowledge of a certain fact at a certain time. Now I knew that fact as well as I could know anything; but I did not acquire my knowledge in a specially orthodox fashion sanctified by legal rules; so although I knew the fact, still I didn't know it, don't you see?" If such a listener should then hear the judges declare that this litigant had become the owner of a large estate which had previously belonged to another, and for which he had paid nothing, all upon this hair-splitting theory, he would probably fancy that he was either in Bedlam, or that he was listening to the recital of a comedy. If he should then hear the same judges declare that a man should lose a large estate because he had not registered a written instrument which the law did not permit to be registered, he would probably conclude that he was losing his senses; and if he should then go out and hang himself in despair, an intelligent jury would certainly bring in a verdict of justifiable suicide.

XV.

The curative act of Congress made the mortgages as valid as against attaching creditors with notice as if they had been duly and legally registered at the time they were actually filed.

1. It cannot be doubted that the act was intended to operate retrospectively, for after stating where mortgages shall thereafter be recorded (*ante*, p. ....) it proceeds as follows:

"All mortgages of personal property in the Indian Territory *heretofore* executed and recorded in the judicial district thereof in which the property was situated at the time they were executed *are hereby validated.*"

The use of the word "heretofore" in the statute removes all possible doubt. It was contended in People *v.* Crennan, 141 N. Y., 239, 36 N. E., 187, that the statute was not retrospective; but the court said, in speaking of the many authorities cited for the rule above mentioned:

"But these authorities, and the rule they establish, have no application; because here the legislative intent is plainly manifested that this section shall have retroactive operation. To hold otherwise we would have to eliminate the word 'heretofore,' which is used in contrast with the word 'hereafter' from the section."

To the same effect:

People *v.* Spicer, 99 N. Y., 233.

Retrospective laws, like other remedial statutes, should be construed liberally.

Wilkinson *v.* Leland, 2 Pet., 627.

Larkin *v.* Saffarans, 15 Fed., 150.

However, if the statute had not been retroactive the effect would have been the same. As the deed had been recorded before

the act was passed, the record became effectual from the passage of the act, and a second filing and recording was not required.

Fowler *v.* Merrill, 11 How., 375.

2. The power of Congress over the territories is plenary. This question has of late assumed very great importance; but, as it has recently been argued before the court, no doubt in all of its phases, we shall not dwell upon it.

It is a familiar historical fact that the first ten amendments to the Federal constitution were proposed by a number of the State conventions at the time of their adoption of that instrument, the object being to curb the power of the Federal government in its operation upon the States and their citizens. Nothing seems to have been said or thought of the territories.

In Mormon Church *v.* U. S., 136 U. S., 42, the court said: "The power of Congress over the territories in general are plenary." In National Bank *v.* County of Yankton, 101 U. S., 133, the court said that Congress was in respect of the territories supreme.

It also said: "Congress may not only abrogate laws of the territorial legislatures; but it may itself legislate directly for the local government. *It may make a void act of the territorial legislature valid, and a valid act void.*" In that case an act of Congress most materially altered a contract which had been made by a territorial legislature with a railway company. The court said that Congress might legislate for the territories "as a State does for its municipal organizations." The extent of the power over such corporations is defined in Laramie County *v.* Albany County, 92 U. S., 310.

See also as to the power of Congress over the territories

Benner *v.* Porter, 9 How., 242.

McAllister *v.* U. S., 141 U. S., 184.

Shirley *v.* Bowlby, 152 id., 48.

Koenigsberger *v.* Richmond Silver Mining Co., 158 U. S., 48.

Am. Ins. Co. *v.* Ganter, 1 Pet., 542.

Rogers *v.* Burlington, 3 Wall., 663.

Good *v.* Martin, 95 U. S., 90.

Clinton *v.* Engelbrecht, 13 Wall., 434.

Reynolds *v.* U. S., 98 U. S., 115.

Hornbuckle *v.* Toombs, 18 Wall., 645.

2 Story Const., secs. 1324, 1325.

The control of Congress over the Indian tribes has always been regarded as unlimited.

U. S. *v.* Kagama, 118 U. S., 380.

The act of Congress extending the constitution and Federal laws over the Indian Territory (*ante*, p. 3) was subject to repeal, and could not prevent a subsequent Congress from passing the curative act in question.

Cooley Const. Lim., 146.

District of Columbia *v.* Hutton, 143 U. S., 18.

3. The curative act applies to pending suits.

U. S. *v.* Peggy, 1 Cranch, 103.

Sidway *v.* Lawson, 58 Ark., 122, overruling Wright *v.* Graham, 42 id., 140.

Pelt *v.* Payne (Ark.), 30 S. W., 426 (1895).

Cooley Const. Lim., p. 469.

Johnson *v.* Richardson, 44 Ark., 372 (1884).

Reid *v.* Hart, 45 id., 50 (1885).

In re Hull, 167 U. S., 38.

Tennessee *v.* Sneed, 96 id., 69.

Perriman's Case, 103 id., 720.

Cooley Const. Lim., 442.

1 Kent Comm., 455.

4. Irrespective of the question presented above as to the unlimited power of Congress over the territories, and over the Indian

tribes, the power of Congress to pass the curative act in question is beyond doubt.

There is no inhibition in the Federal constitution on the power of Congress to pass retrospective laws.

Curtis *v.* Whitney, 13 Wall., 70.

There is such an inhibition against legislation in some of the State constitutions which works at times great injustice. There is a provision in the constitution of Tennessee that "no restrospective law or law impairing the obligation of contracts shall be made;" and yet it is construed to apply only to the impairment of contracts, and as not prohibitory of the large class of acts affecting remedies, remitting penalties, and so on. "In short" the court said, "So many are the past transactions upon which the public good requires posterior legislation that no government can preserve order, suppress wrong, and promote the public welfare without the power to make retrospective laws."

Townsend *v.* Townsend, Peck. R., 117.

Larkin *v.* Saffarans, 15 Fed., 147.

5. The attaching creditors have acquired no such rights as prevent the operation of the curative statute in this instance.

It is contended for the plaintiff in error that by paying a clerk a dollar for a writ of attachment, and paying a marshal a small sum for making a levy by copying a description of a lot of cattle from a public record, the plaintiffs below acquired a *vested right* to take from the pocket of a third person with whom they had no contractual relation, and who had never done them any harm, the sum of nearly $56,000; and that that sacrifice is so essential to justice that it is included in the same constitutional guaranty that protects our liberty and our lives, something sacred and inviolable, beyond the reach of human power. We do not think so. Any right, however ephemeral or precarious, may be properly spoken of as vested as long as it lasts.

The fifth amendment uses the word "property;" and if we can only stick to the text we shall have no difficulty.

An attaching creditor has no *property* in the thing attached; hence his lien does not give him a right to sue for an injury to it.

Ladd *v.* North, 2 Mass., 514.
Bigelow *v.* Wilson, 1 Pick., 492.
Dobbins *v.* Hanchett, 20 Ill. App., 396.
Davidson *v.* Beatty, 3 Har. & McH., 594.
Owings *v.* Norwood, 2 Har. & J., 96.
Millar *v.* Babcock, 25 Mich., 137.
Goddard *v.* Perkins, 9 N. H., 488.
Snell *v.* Allen, 1 Swan, 208.

"The laying of an attachment does not change the title to the property attached. The right of property remains in the defendant, subject to the lien of the attachment."

Starr *v.* Moore, 3 McLean, 354.

The quality of an attachment lien in this case will, we should think, depend on the statute under which the writ was issued, connected with the judicial construction placed upon it by the Supreme Court of Arkansas before the importation of the statutes into the Indian Territory. The decisions of that court are perfectly explicit.

It is true that in Harrison *v.* Trader, 29 Ark., 92 (1874), the special judge who delivered the opinion likened an attachment lien to liens created by contract; but what he said in this respect had no possible relation to the questions before the court; and he expressly qualified his statement by saying that he did not intend that it should apply wherever the rights of third persons intervened. Since that time the same court has overruled that *dictum*.

"This lien is allowed for no purpose except that for which the attachment is allowed. It creates no estate in the property attached,

nor divests prior rights or equities therein. It is neither a *jus ad rem* nor a *jus in re.*"

Tennant *v.* Watson, 58 Ark., 255 (1893).

"An attachment has no bearing on the merits of a suit. It is only ancillary to secure the fruits of any judgment to be obtained. It brings under control of the court—not of the plaintiff—property to be held for the purpose. The ownership is not changed. The plaintiff has no right to it in any case as property; and to remove and sell it, with or without the consent of the sheriff, is a contempt of court."

Atkins *v.* Swope, 38 id., 536 (1882).

This is in accordance with the doctrine prevailing everywhere.

2 Sto. Eq., sec. 1215.

Pratt *v.* Law, 9 Cranch, 497.

The question as to the power of the legislature to pass a curative act which will destroy an attachment lien has been thoroughly considered by the Supreme Court of Arkansas, and has been settled as far as that court could settle it.

In Green *v.* Abraham, 43 Ark., 420 (1884), a deed of trust—which is the same thing as a mortgage under the registry laws—(Cross *v.* Fomby, 54 Ark., 179) was acknowledged before a person not authorized to take it; and the property mortgaged was afterwards levied on under execution. Still later an act was passed curing the defective acknowledgment. In a contest between the execution creditor and the mortgagee it was held that, as there was no clause in the State constitution forbidding retrospective legislation, the mortgagee had a right superior to that of the execution creditor. The court said:

"A purchaser from McReynolds (the mortgagor) of this crop between the recording of the trust deed and the passage of the law, could not be deprived of his property by an act which restrospectively

deprived Reynolds of the title he had when the purchase was made. But the constable, levying his execution upon the corn as the property of McReynolds, is not a purchaser. He has indeed succeeded to the rights of McReynolds, so far as this action is concerned; but his equities are no greater than those of McReynolds. *And neither he nor McReynolds, can have a vested right to a defense based upon an informality which does not affect his substantial equities.*"

Of course the mortgage, though unrecorded, was good as between the immediate parties to it.

Jacoway *v.* Gault, 20 Ark., 193.

The case of Green *v.* Abraham has recently been affirmed by the same court in Steers *v.* Kinsey, 58 S. W., 1050.

In that case a mortgage was executed and registered; but as the certificate of acknowledgment was defective, the registration was invalid. The lands mortgaged were attached in suits against the mortgagor; the attachments were sustained, judgments were rendered in favor of the attaching creditors; and the lands were sold to the plaintiffs in the attachments. After the attachments were levied a curative act passed. The court held that it cured the defective acknowledgment, and rendered the mortgage superior to the attachments, saying:

"The statute cured defects in the acknowledgment to the mortgage, and gave it, except as to persons having acquired vested rights in the land before the passage of the acts, the same force and effect it would have had had it been properly acknowledged in the first instance. The only question that remains, then, is whether the parties who brought the attachment suits acquired vested rights in the land by the bringing of the suits and the levy upon the lands. Now, a vested right 'must be something more than a mere expectation based upon the anticipated continuance of existing laws. It must have become a title, legal or equitable, to the present or future enjoy-

ment of property,' in some way or another. Black, Const., 430; Suth. St. Const., 164. But parties have no vested rights in remedies or matters of procedure; and we see nothing in these attachment proceedings that constituted a vested right on the part of the plaintiffs therein to the property attached. The attachments were levied upon the land after the mortgage under which the Arkansas City Improvement Company holds had been executed and recorded, and we think that it was within the power of the legislature to give to such mortgage the effect intended by the parties thereto by curing the formal defect in the acknowledgment."

These views we believe are in strict accord with those often announced by this court, and with the general current of decisions throughout the country.

"The contracts designed to be protected by the Federal constitution 'are contracts by which *perfect rights*, certain *definite fixed private rights of property* are vested.'"

Butler *v.* Pennsylvania, 10 How., 416.

"To constitute a violation of the provision against depriving any person of his property without due process of law, it should appear that such person *has a property* in the particular thing of which he is alleged to have been deprived."

New Orleans *v.* N. O. Water Works Co., 142 U. S., 88.

In Campbell *v.* Holt, 115 U. S., 620, it is held that though an action on a debt has been barred by limitation, yet if the legislature repeals the statute of limitations the debt is revived. The following language seems to be conclusive:

"It is to be observed that the word vested right is nowhere used in the constitution; neither in the original instrument, nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments; but when we get beyond this, although vested rights

may exist, *they are better described by some more exact term,* as the phrase is not one found in the language of the constitution. We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case."

In speaking of curative statutes this court has said:

"To the objection that such laws violate vested rights of property it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character. *Consent to remedy the wrong is to be presumed.*"

Randall *v.* Krieger, 23 Wall., 149.

This has often been repeated.

"When vested rights are spoken of by the courts as being guarded against legislative interference they mean those rights to which a party may adhere, and upon which he may insist without violating any principles of sound morality. * * * In the nature of things there can be no vested right to violate a moral duty, or to resist the performance of a moral obligation."

Banger *v.* Nelson, 9 Gill, 309.

"Courts do not regard rights as vested contrary to the equity and justice of the case."

Goshorn *v.* Purcell, 11 Ohio St., 652.

Though a contract inhibited by law is void, yet it may be rendered valid by a repeal of the law.

Little Rock *v.* Merchants' National Bank, 98 U. S., 314.

No creditor has a vested right in any particular remedy.

St. Louis R. *v.* Alexander, 49 Ark., 190.

Porter *v.* Doe, 10 id., 187.

Files *v.* Fuller, 44 id., 281.

South Carolina *v.* Guillard, 101 U. S., 433.

Memphis *v.* U. S., id., 293.

Webster *v.* Cooper, 14 How., 488.

In speaking on this subject the court, in Antonie *v.* Greenhow, 107 U. S., 769, say:

"In all such cases the question becomes therefore one of reasonableness; and of that the legislature is primarily the judge. We ought never to overrule the decision of the legislative department of the government unless a palpable error has been committed. If a state of facts could exist that would justify the change in the remedy which has been made we must presume it did exist; and that the law was passed on that account. We have nothing to do with the motives of the legislature if what they do is within the scope of their powers under the constitution."

Mr. Cooley says:

"If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute."

Const. Lim., p. 457.

Green *v.* Abraham, 43 Ark., 423.

Could not Congress in the first instance have provided that actual notice of a mortgage should be equivalent to registration? No one can doubt that.

In Conkey *v.* Hart, 14 N. Y., 28, a lease provided that in case of default in payment of rent the landlord might distrain for it. The law at the date of the lease gave the right to distrain; but the legislature repealed the law. It was held that this was a matter pertaining to the remedy, in respect of which the power of the legislature could not be controlled by contract; and that the right of distraint was gone.

Though one may by existing law be entitled to a mechanic's lien it may be divested by a repealing statute.

"The lien is bestowed, not to create a debt or charge, but to create

a remedy—a means to collect a debt. This remedy that the legislature has created in derogation of the common law it can take away; and no one can have a vested right to any particular remedy."

Haynes *v.* Wady, 73 Mich., 178, 41 N. W., 222.

Bangor *v.* Goding, 35 Me., 73; 56 Am. Dec., 688.

A statute may take away an existing right to an appeal.

McCardle *ex parte*, 7 Wall., 506.

R. Co. *v.* Grant, 98 U. S., 398.

Norris *v.* Crocker, 13 How., 438.

Sherman *v.* Grinnell, 123 U. S., 679.

Gurney *v.* Patrick Co., 137 id., 141.

Morey *v.* Lockhart, 123 id., 56.

Nat. Bank *v.* Peters, 144 id., 570.

Hornthal *v.* Collector, 9 Wall., 560.

Assessor *v.* Osborne, id., 567.

"Actions are always brought in view of the known power of the legislature to change or modify rules of procedure at pleasure; and a litigant cannot consistently claim that, because the legislature takes away some privilege which was accorded to litigants when the suit was instituted, he is thereby deprived of a vested right."

Campbell *v.* Silver Mining Co., 27 C. C. A., 646; 83 Fed., 643, Eighth Circuit.

Where a court has transcended its jurisdiction, and its judgment is void, the legislature may validate it.

Mechanics' Bank *v.* Union Bank, 22 Wall., 298.

In Wilkinson *v.* Leland, 2 Pet., 627, lands lying in Rhode Island were sold under an order of a probate court in New Hampshire. This court said: "The sale made by the executrix in virtue of the said license was utterly void; and the deed given thereupon was, *proprio vigore*, inoperative to pass any title of the testator to any lands described therein. It was a mere nullity."

But as the legislature of Rhode Island had passed an act confirming the sale, the court held it valid.

In Curtis *v.* Whitney, 13 Wall., 70, it appeared that defendant had bought lands at a tax sale under a statute that gave her the absolute right to a deed at the end of three years. Then the legislature passed an act providing that no deed should be made unless the tax purchaser should give notice of application for deed three months before time for issuing it. The act was in terms retrospective.

The court, by Miller, J., said:

"The legislature may validate a void judgment if it is just to do so. Mechanics' Bank *v.* Union Bank, 22 Wall., 298. That a statute is not void because it is retrospective has been repeatedly held by this court; and the feature of the act of 1867 which makes it applicable to certificates already issued for tax sales does not of itself conflict with the Constitution of the United States. Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts that they may be affected in many ways by State and national legislation. For such legislation, demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the Federal constitution so long as the obligation of performance remains in full force."

Accordingly it was held that the act in question was valid.

This decision was followed in Vance *v.* Vance, 108 U. S., 514.

The case of Satterlee *v.* Matthewson, 2 Pet., 407, was not unlike this. The case went up by writ of error from the Supreme Court of Pennsylvania. By the settled law of that State the relation of landlord and tenant could not subsist under Connecticut titles. While the suit was pending, and after it had been once tried, the Pennsyl-

vania legislature passed an act declaring "that the relation of landlord and tenant shall exist, and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between other citizens of this commonwealth."

It was contended that this act was unconstitutional as destructive of vested rights. The court held the act to be valid.

Watson *v.* Mercer, 8 Pet., 88, is a leading case on this subject. Mercer and wife in 1785 conveyed land belonging to her. The certificate of acknowledgment being defective the Supreme Court of Pennsylvania held that the deed conveyed no title. Forty-one years after that the legislature passed a curative act making the deed effective. The court held that this act was valid, saying:

"So far, then, as it has any legal operation, it goes to confirm and not to impair, the contract of the *femes covert*. It gives the very effect to their acts and contracts which they intended to give; and which from mistake or accident, has not been effected."

When a statute conferring jurisdiction is repealed, pending suits fall with it.

Ins. Co. *v.* Ritchie, 5 Wall., 544.

So of a suit for a statutory penalty when the statute creating the penalty is repealed.

Norris *v.* Crocker, 13 How., 439.

U. S. *v.* Tyne, 11 Wall., 88.

So the legislature may by retrospective statute allow appeal or writ of error on past judgments where none has been previously allowed.

Baltimore R. Co. *v.* Nesbitt, 10 How., 395.

Calder *v.* Bull, 3 Dallas, 386.

Cases where void deeds of married women have been validated are too numerous to mention.

Randall *v.* Krieger, 2 Dill., 444.

S. C., 23 Wall., 137.

Maynard *v.* Hill, 125 U. S., 210.

Richardson *v.* Bellingham Co., 47 Fed., 854.

Retrospective laws may deprive one of a defense based solely on a statute, such as usury.

Ewell *v.* Daggs, 108 U. S., 150.

Woodruff *v.* Scruggs, 27 Ark., 26.

And may take away execution judgment liens.

McCormick *v.* Alexander, 2 Ohio, 74.

And laborers' liens.

Bangor *v.* Golding, 35 Me., 73; 56 Am. Dec., 688.

After inquisition found under proceedings of eminent domain the legislature may set it aside, and direct a new inquisition.

Baltimore R. *v.* Nesbitt, 10 How., 395.

Essex Board *v.* Skinkle, 10 id., 334.

Retrospective laws repealing statutes for imprisonment for debt are not unconstitutional.

Sturgis *v.* Crowninshield, 4 Wheat., 201.

Van Hoffman *v.* Quinby, 4 Wall., 553.

As a remedy for the collection of debts it was more efficient than an attachment. It was not "in derogation of the common law." It was part of the common law by inheritance; and was no doubt familiar to Noah before he began to build the ark. How then is an attachment more sacred? The attachment laws are certainly "in derogation of the common law."

Hynson *v.* Taylor, 3 Ark., 555.

Edwards *v.* Cooper, 28 id., 469.

In the case of Watson *v.* R. Co., 47 N. Y., 157, one of the parties had a judgment lien on lands. Under a statute which did not require that holders of such liens should be made parties to proceedings to condemn lands by right of eminent domain they were condemned by

a railway company. There was a sale under the judgment, and the purchaser claimed them as against the assignee and receiver of the railway company. But the court held that the judgment lien was extinguished.

A court of chancery cannot, in correcting mistakes in written documents, divest the vested rights of third persons.

Davidson *v.* Davidson, 42 Ark., 362.

Woodworth *v.* Cook, 2 Blatchf., 151; 30 Fed. Cas., p. 561.

Gibson *v.* Cook, 2 Blatchf., 144; 10 Fed. Cas., p. 314.

Moloney *v.* Rourke, 100 Mass., 190.

Green *v.* Abraham, 43 Ark., 624.

The limitation on the power of a court of chancery to correct mistakes is therefore precisely the same that is applied to curative statutes.

Let us see how it has been defined by the Arkansas courts.

In Simpson *v.* Montgomery, 25 Ark., 365 (1869), a mortgage, or deed of trust, which is the same thing under the registration acts (Bowen *v.* Fassett, 37 Ark., 510), (1881), had been improperly acknowledged, so that its registration was not notice to anyone. After that the mortgagor conveyed to a third person who had notice of the mistake, though it was held that the registration imparted no notice. (P. 372.) On a bill filed to correct the mistake, the court held that, as the purchaser had actual notice of it at the time of buying, the relief prayed should be granted.

The court said:

"And this relief (for the correction of mistakes) is not only afforded against original parties, but also against those claiming under them as heirs, devisees, judgment creditors, or purchasers from them with notice of the facts."

In Stewart *v.* Pettigrew, 28 id., 372 (1873), a sheriff levied an execution on certain lands; but in his return and advertisement he

described them by the wrong numbers. Then they were levied on under a junior judgment; the proper numbers were given in the return and advertisement, and they were sold to a purchaser having notice of the mistake in the former return and advertisement. The court corrected the mistake, and quieted the title of the first purchaser.

There is no difference in legal effect between an attachment lien and a judgment lien.

Grubbs *v.* Ellison, 23 id., 287 (1861).

Meadow *v.* Wise, 41 id., 289 (1883).

Beard *v.* Wilson, 52 id., 296 (1889).

In view of that obvious fact the case of Blackburn *v.* Randolph, 33 id., 126 (1878), is conclusive of this controversy. The suit was in equity to correct a mistake in description of lands in a series of deeds, and was defended by one having an execution lien. In speaking of the previous case of Steward *v.* Pettigrew, *supra,* the court said: "Here was a total want of privity, and the court proceeded upon the broad ground that an honest mistake in a deed should be corrected against anyone who discovers it, and *without superior equity seeks to obtain an advantage from it.*"

In the case then before the court (Blackburn *v.* Randolph) it did not appear that the latter, who claimed under the execution lien, had any notice of the mistake until the commencement of the suit. The execution defendant had been adjudicated bankrupt; but the court declined to consider the effect that bankruptcy would have on the execution lien; but said:

"Even if the lien existed, the equity for correction would be prior in time; and, as this court has repeatedly held, *it would not be displaced* by the judgment lien *or an execution levied under it.*"

The next case, Allen *v.* McGaughey, 31 Ark., 253 (1876), is equally decisive. In that case suit was brought to reform description of land in a deed by substitution of another tract for that inserted.

Defense by purchaser under execution against the grantor. It was held that he was not an innocent purchaser for value; and a decree was rendered as prayed.

The case of Williams *v.* McIlroy, 34 id., 85 (1879), is very much the same. The action was ejectment. A deed had been made to the defendants, omitting one tract of land by mistake. They went into possession. Plaintiff levied execution on the omitted tract. Afterwards the grantor and the grantees, having discovered the mistake, the former made a second deed conveying to them the omitted tract. Plaintiff had a sale under the execution, bought in the omitted tract, got a sheriff's deed, and brought suit for possession. On the authority of Byers *v.* Engles and Allen *v.* McGaughey the court held that the execution purchaser got no title. The court held that by the second deed the grantor "did just what a court of equity upon the facts disclosed in the transcript before us would have compelled him to do;" adding: "The mistake in the original deed was thereby corrected, and the legal title to the land perfected in the grantees." Some stress is laid on notice from possession; whereas in the McGaughey case the subject of notice was not mentioned.

Brewster *v.* Clamfit, 33 Ark., 76 (1878), is in line with the others. There was an omitted tract, and opposition to reformation came from a judgment creditor having a lien. The only difference between this case and the others is that in this there was no execution lien. There had been no sale under the judgment. The court held that the judgment creditor was not in a position to oppose the reformation.

In Knight *v.* Glasscock, 51 id., 390 (1888), a deed was reformed over the objection of a purchaser with notice.

Fort Smith Milling Co. *v.* Mikles, 61 Ark., 123 (1895), covers every point. That was a case where land was misdescribed in a mortgage, and a suit was brought to reform. It was defended by a

purchaser under a judgment with notice. It was contended that under the doctrine of Main *v.* Alexander the relief must be denied; that is, counsel made precisely the same contention that is made here; but the court overruled it; holding that the doctrine of Main *v.* Alexander did not apply to a case of equities *dehors* the mortgage; and that they could not be defeated by purchasers with notice of them.

It is true that this decision was made after the adoption of the Arkansas statutes by Congress; but it is in line with previous cases, and is based on decisions made in other State that must command the highest respect.

See also Wadsworth *v.* Wandell, 5 Johns. Ch., N. Y., 224.

Bernardo Tp. *v.* Stebbins, 109 U. S., 391.

It must be perfectly plain, we think, that if the rights of lienholders, purchasers under judgments with or without notice, and purchasers at private sale with notice, had not such vested rights as would stay the hand of a chancellor in reforming a contract, they could hardly stay the power of Congress to pass a curative statute applying to cases as against precisely the same kind of rights.

Is it possible that we have two kinds of vested rights, one for the courts and another for Congress? If so, who shall draw the line of demarkation?

Mr. Cooley says:

"If the thing wanting, or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute."

Const. Lim., p. 457.

Green *v.* Abraham, 43 Ark., 423.

Could not Congress in the first instance have provided that actual notice of a mortgage should be equivalent to registration?

In Freeland *v.* Williams, 131 U. S., 405, the court held valid a clause in the constitution of West Virginia prohibiting the issue of process on any judgment previously rendered for damages for acts done during the rebellion according to the usages of civilized warfare. The court said, in speaking of the prior decision in Freeborn *v.* Smith, 2 Wall., 160:

"In the latter case Mr. Justice Grier, when the Congress of the United States had allowed an appeal where the judgment would otherwise have been final, used this language: 'If the judgment below was erroneous the plaintiff in error had a moral right at least to have it set aside; and the defendant is only claiming a vested right in a wrong judgment.' And he thus quotes the language of C. J. Parker, in Foster *v.* Essex Bank, 16 Mass., 245, 'The truth is there is no such thing as a vested right to do wrong; and a legislature which, in its acts not expressly authorized by the constitution, limits itself to correcting mistakes, and to providing remedies for the furtherance of justice, cannot be charged with violating its duty, or exceeding its authority.' "

In Freeborn *v.* Smith, 2 Wall., 160, there had been an omission to provide for writs of error in a certain class of cases, which was afterwards cured by act of Congress. It was objected that after the lapse of the term the judgment in the case on hearing had become final; and that it was beyond the reach of Congress.

The court, by Mr. J. Grier, said:

"What obstacle was in the way of legislation to supply the omission to make provision for such case in the original act? If it comes within the category of retrospective legislation, as has been argued, we find nothing in the constitution limiting the power of Congress to amend or correct omissions in previous acts. It is well settled that where there is no direct constitutional prohibition a State may pass retrospective laws, such as in their operation may affect suits

pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings. * * *

"If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside; and the defendant is only claiming a vested right in a wrong judgment."

The court then quoted the language of C. J. Parker, in Foster *v.* Essex Bank, and added:

"Such acts are of a remedial character, and are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power."

See also Sampeyrac *v.* U. S., 7 Pet., 222.

Goshorn *v.* Purcell, 11 Ohio St., 78.

Trustees *v.* McCaughey, 2 id., 155.

The legislature may recognize and sanction moral obligations that previously could not have been enforced. Thus betterment laws may be made to operate retrospectively.

Beard *v.* Dunsby, 48 Ark., 184.

Leighton *v.* Young, 52 Fed. Rep., 444, 18 L. R. A., 266.

So mechanic's liens are frequently created for work previously done.

Phillips Mec. Liens, sec. 23.

Best *v.* Baumgardner (Penn.), 15 Atl., 691.

Providence Institution *v.* Jersey City, 113 U. S., 315.

In Bolton *v.* Jones, 5 Penn., 145, 47 Am. Dec. 404, a mechanic's lien statute was held to operate retrospectively. Gibson, J., said, "But the scene may be changed by the introduction of a *purchaser for value actually paid.*"

A repeal of a statute does not take away a vested right.

St. Louis R. *v.* Alexander, 49 Ark., 190.

Porter *v.* Doe, 10 id., 187.

Files *v.* Fuller, 44 id., 281.

South Carolina *v.* Guillard, 101 U. S., 433.

Memphis *v.* U. S., 97 id., 293.

Webster *v.* Cooper, 14 How., 488.

The repeal of the attachment laws would have the effect to dissolve a pending attachment.

National Bank *v.* Riethman, 79 Fed. Rep., 582, Ct. App., Eighth Circuit.

No creditor has a vested right in a particular remedy.

Tennessee *v.* Sneed, 96 U. S., 69.

Perriman's Case, 103 id., 720.

1 Kent Comm., 455.

As to curative acts "the question is one of reasonableness."

Terry *v.* Anderson, 95 U. S., 80.

State *v.* Newark, 27 N. J. L., 197.

5. In the construction of curative acts there is a wide difference between claims that are based on contracts and non-contractual claims.

In Louisiana *v.* Mayor of New Orleans, 109 U. S., 285, a judgment having been obtained against the city for a tort, the legislature afterwards passed an act to lessen the rate of municipal taxation, which practically cut off all remedy for the collection of the judgment. The court say:

"The effect of this last limitation is to prevent the relators, who are not allowed to issue execution against the city, from collecting their judgments, as the funds receivable from the tax thus authorized to be levied are exhausted by the current expenses of the city, which must first be met."

The court, however, held that the act was valid because no contractual relation existed between the parties; and that the fact that the claim had been reduced to judgment made no difference.

To the same effect:

Louisiana *v.* St. Martin's Parish, 111 U. S., 716.

Freeland *v.* Williams, 136 id., 405.

Chase *v.* Curtis, 113 id., 463, 464.

Wisconsin *v.* Ins. Co., 127 id., 292.

As to rights growing out of contracts the rule is thus stated:

" When a right has arisen *upon a contract, or a transaction in the nature of a contract* authorized by statute, and has been so far perfected *that nothing remains to be done by the party asserting it,* the repeal of the statute does not affect it or an action for its enforcement. It has become a vested right which stands independent of this statute."

Steamship Co. *v.* Joliffe, 2 Wall., 457.

Freeland *v.* Williams, 136 U. S., 405.

Chase *v.* Curtis, 113 id., 463, 464.

It may be said that the proceeding of plaintiff in error is not for a tort; but that is an evasion. It is certainly not based on any contract. It is nothing less than surprising that counsel for the attaching creditors should say that the judgment against Blocker amounts to a contract with the interveners. A judgment, even when rendered on a contract, is not a contract.

Morley *v.* R. C., 146 U. S., 146.

Louisiana *v.* Mayor, 109 id., 288.

Garrison *v.* New York, 21 Wall., 203.

XVI.

The dissenting opinion of his honor, Judge Sanborn.

Occasional extracts from this opinion will show the grounds of our contention.

1. "The act of Congress had the effect to transfer instantly *property* of the value of $55,875.71, from the defendants in error to the Evans-Snider-Buel Company."

If that were true the conclusion reached would be invincible.

If it were true it would open a new and an easy road to wealth, of which no doubt many would gladly avail themselves. If by suing out an attachment the plaintiffs acquired an actual right of property there would be an end of controversy, because the legislature could not take it away without just compensation, at least, and the courts could not change the status. Such being the case an intervention could only be inspired by folly or madness. But we do not think that it was ever understood that when a plaintiff in attachment or execution obtains a levy he thereby acquires a property in the thing seized. So when a libellant in admiralty causes a ship to be seized, or a plaintiff in equity obtains the appointment of a receiver, the title to the property is not changed.

In none of these cases does the seizure in any manner affect the title.

High, Inj., secs. 1, 5.

If the rule were as stated in the dissenting opinion the question of title would be settled by the clerk and marshal at the inception of the suit, leaving third persons to whom the property belonged no right to be heard; and this would not be due process of law.

We have already discussed this question.

If a lien implies the transfer of a property right, then it is clear

that the men who made the English language did not know what they were talking about; for both etymologically and otherwise the words "attachment" and "lien" denote the act of tying up; and not an act of adjudication, appropriation or confiscation.

The lien, after all, amounts only "to a security against subsequent purchasers and incumbrances."

4 Kent, Comm.,* 436.

An attachment lien is not a lien at all, but only by analogy so called.

1 Jones, Liens, sec. 12.

"It is a well settled principle that an attaching creditor can acquire through his attachment no higher or better rights to the property attached than the defendant had *when the attachment took place,* unless he can show some fraud or collusion by which his rights are impaired."

Drake, Attachm., sec. 223.

The italics are those of the author.

Again the same author says:

"A fundamental principle is that an attaching creditor can acquire no greater right in attached property than the defendant had *at the time of the attachment.* If therefore the property be in such a situation that the defendant has lost his power over it, or has not yet acquired such interest in or power over it as to permit him to dispose of it adversely to others, it cannot be attached for his debts. Thus a chattel pawned or mortgaged is not attachable in an action against the pawner or mortgagor."

Id., sec. 245.

Again the italics are those of the author.

In Arkansas the interest of the mortgagor of chattels cannot be levied on.

Jennings *v.* McIlroy, 42 Ark., 236.

Buck *v.* Bransford, 58 id., 291.

Cox *v.* Harris, 64 id., 214.

"An attachment consfitutes a lien merely upon the land; but the general property of the owner is not divested."

Merrick *v.* Hull, 15 Ark., 344.

In that respect the court liken it to "a proceeding *in rem* in admiralty."

There were certain ill considered *dicta* on this subject in Bigelow *v.* Topliff, 25 Vt., 273, but they were overruled in Hackett *v.* Callender, 32 id., 108, in which case the court said:

"There is an obvious difference in the equities of a subsequent *bona fide* purchaser of land without notice of a trust and of a creditor who attaches to secure an antecedent debt. The purchaser advances his money to buy the land. He gives a new consideration. He parts with a new value upon the credit of the record title. The attaching creditor merely seeks to secure an old debt. He advances nothing on the strength of the record title. He is not made worse by relying upon it. The omission of the real owner to record his deed has not injured the creditor, or been the means of depriving him of any value. * * * If a creditor, relying on his attachment and the record, had surrendered other securities, he might have a superior equity. But the case at bar shows no such or similar equity. It is merely the case of an attaching creditor attempting to secure an old debt against an insolvent debtor by attachment. No new value, credit or consideration is shown, no securities lost, endangered or surrendered.

"Analogous decisions sustain this distinction. When goods are obtained by false pretences the subsequent purchaser without notice obtains a good title to them. Not so the attaching creditor. He gets nothing by his attachment. He stands in the shoes of his debtor. * * * When the purchaser has paid his money and bought the legal title he has at least an equal equity with the *cestui*

que trust; and having the legal right also, his title and equity united give him precedence. But the attaching creditor upon an antecedent debt has neither the equity nor the legal title; and notice to him of the trust before he gets the legal title by levy, and so discharges his debt, should put an end to his lien as between him and the real owner."

This was affirmed in *Perrin v. Reed,* 35 Vt., 8; *Hart v. Farmers' Bank,* 33 id., 253.

The authorities on this subject are too numerous for citation. Many of them will be found by reference to 20 Encyclopedia of Law, p. 577.

2. "In the discussion of the question at issue it must be borne in mind that it was not a mere judgment against the person, or the right to enforce such a judgment, or a mere general lien to secure it of which the defendants were here deprived."

This seems to be a case of inverted sympathy. No one can be deprived of anything that he never had. The lien was subsisting; but as it was purely remedial, and something subject to congressional control, it is evident that the attaching creditors have lost nothing except a delusive hope of appropriating to their own use property on which they never had a shadow of an honest claim. For it they have never paid a cent; for it they do not propose to pay a cent; yet they make the welkin ring with the cry of "Stop, thief!" If the law were only an unmitigated game of grabs one could perceive some ground for such ejaculations.

3. "The Supreme Court of Arkansas for forty-eight years have held that a failure to record a mortgage raised a conclusive presumption of fraud." On the other hand the same court has consistently held for about the same length of time that one who, with knowledge of the facts, abuses the process of the courts by seizing property belonging to a third person is guilty of an actual fraud. So the honors are easy, except that one would rather be accused of constructive than of actual fraud.

The real question is what is fraud? A false nomenclature proves nothing. The purest and most sublime precepts of morals and religion have been made the subjects of mockery and derision. "Fraud," says Mr. Roberts, "consists either in a single act, or in a continual series of acts, and two parties are always necessary—a person deceiving, and a person to be deceived—to give it that action and determination which renders it the subject of human cognizance and law."

Fraud. Conv., p. 30.

How have the plaintiffs in error been deceived, and by whom?

The conflict of decisions liberates the principle. As truth is better than falsehood, fact more trustworthy than legal fictions, let us see where the truth really lies; even in a legal discussion it may be entitled to some weight since the law is not yet wholly reduced to mathematical formalism.

There is no doubt about the facts. The Evans-Snider-Buel Company advanced to Blocker about $130,000 for the purpose of buying the cattle in controversy; and this was all that was paid for them. The Evans-Snider-Buel Company took mortgages to secure the advances. They are purchasers for value.

Fargason *v.* Edrington, 49 Ark., 214 (1887).

Gerson *v.* Pool, 31 id., 85 (1876).

Kesner *v.* Trigg, 98 U. S., 50.

They are also creditors, if there is any magic in that word. At that time McFadden & Son had a judgment against Blocker in Texas. There is nothing to show that the Evans-Snider-Buel Company had ever heard of McFadden & Son, or of their judgment. But the advances to Blocker, and the mortgages did not in any way lessen the security which they had for their judgment, or impair any right or hope of theirs. The chance was that the transaction might be a benefit; which it would be if the cattle should sell for more than the

advances. Now McFadden & Son are seeking to appropriate the large sum for which they had judgment against Blocker from the Evans-Snider-Buel Company, on account of the merest legal technicality, vociferating that the Evans-Snider-Buel Company committed a gross fraud against them in not recording mortgages which the law did not allow to be recorded (!), or rather for recording them when the law made no provision for recording them. And all of this time Blocker & Son admit that they had all of the knowledge of the mortgages that they could have acquired if the law had made provision for their registration. If there can be any dispute about the morals of such a case we are willing to place the profoundly just and honorable opinion of Lord Hardwick in Le Neve *v.* Le Neve alongside of the grotesque utterances in Main *v.* Alexander, and then let this court decide.

"Of two such lessons why forget
The nobler and the manlier one?"

4. "The suggestion of the majority that the judgment against Blocker did not evidence a vested right in the cattle in the defendants in error as against the Evans-Snider-Buel Company does not seem to be founded in fact, because, while that judgment did not estop the company from claiming the cattle from the defendant in error, and from litigating their claim, it did vest in the defendants in error an established lien and interest in the cattle superior to that of the Evans-Snider-Buel Company which was no longer open to doubt or controversy in the courts, or under the law of the land."

According to this view the judgment against Blocker would not prevent the interpleader from having a trial on the interplea, though such a trial could not possibly avail them anything.

We understood his honor, Judge Sanborn, in Waples-Platter Co. *v.* Low, 54 Fed., 95, to say:

"Thus it will be seen that the issues between the plaintiff and

defendant and those between the plaintiff and the interpleader were not identical; and to prevent confusion and error it was imperatively necessary that the court should keep the broad distinction between them clearly in mind, and should carefully and distinctly present it to the jury in its charge. The practice of trying these issues together and to the same jury is deprecated. The better practice is to first and separately try to the court the issue between the plaintiff and defendant arising under the attachment affidavit. Sanger *v.* Flow, 1 C. C. A., 56, 61; 48 Fed. Rep., 152; Holiday *v.* Cohen, 34 Ark., 707, 716. The difficulty, confusion, and error that are liable to result from a trial of both issues together to the same jury are well illustrated in this case."

If a judgment against the defendant precludes the interpleader as well as the defendant, we do not see why the trials should be separate. We have seen that the interpleader cannot make himself a party to the proceedings as against the defendant. (*Ante*, p. 5.) If then the finding on that issue precludes the interpleader he is condemned unheard.

No sensible person would interplead under such conditions; as it might well happen that the defendant might have no defense, or might in any case refuse to defend.

In Huiscamp *v.* Moline Wagon Co., 121 U. S., 319, after speaking of the proof that the attaching creditors must make in order to sustain the attachment, the court said:

"Such proof could not be made as against the interpleaders, * * * by proving that the issue as to the intent of Rummel (the defendant in the attachment) had been tried and found against him in the trial on his plea of abatement (denying allegation of fraud on which the attachment was obtained). That was an issue to which the interpleaders were not parties; and the record of its trial was wholly inadmissible as against the interpleaders."

If the view expressed in the dissenting opinion is correct it is certainly strange that it was never suggested in the scores of railway foreclosure suits that have come to this court solely on controversies growing out of interventions. Appended to the judgment against Blocker was this order:

"And it appearing to the court that the Evans-Snider-Buel Company have interpleaded in this cause, claiming the property levied on under the writ of attachment sued out by the plaintiffs, and levied upon as the property of J. R. Blocker, and that said interplea is yet undisposed of, and waiting trial thereon; and the plaintiffs having filed their application in due form for a change of venue of this cause to one of the other places of holding court in the northern district, said cause is hereby transferred to Tahlequah, one of the places of holding court in the said district; and plaintiffs are given until the first day of next term of court to be held at Tahlequah, to plead, answer or demur to said interplea."

In the dissenting opinion various cases are cited to show that the final judgment against the defendant relates back to the beginning of the lien and perfects it; but these decisions only relate to the rights of the plaintiff and the defendant. In none of them were the rights of interveners discussed or involved. A judgment only binds parties and privies; and the judgment against Blocker was as to the interpleaders only waste paper.

The dissenting opinion calls the curative statute "an arbitrary act of Congress;" but it does not seem to be more arbitrary than a decision taking the property of A and giving it to B upon a lot of fine-spun and contradictory technicalities, none of which has the least bearing on the very right and justice of the case.

We are unable to perceive the applicability of Fletcher *v.* Peck, 6 Cranch, 135; Calder *v.* Bull, 3 Dallas, 383; Gunn *v.* Barry, 15 Wall., 610, and other cases resting on contracts.

In the first of these cases the court said:

"When then a law is in its nature a *contract*, when absolute rights have vested under that *contract*, a repeal of the law cannot divest those rights."

The law encourages the making of contracts by which individuals enact laws for themselves in a small way; for nothing else does so much to cement all elements of society into a common unit; not even the domestic relations which form only local aggregations. Next to the duty of keeping the peace, governments are organized for the purpose of preserving and promoting good faith and integrity in the performance of contracts. Apart from these governments, with their vast and reiterating burdens, have no excuse for being. It is true that in the case of a contract the right and the remedy, or some adequate remedy, are inseparably connected; because the contract is indestructible; and an adequate remedy is in the contemplation of the parties, and is made a part of it. But the government has entered into no unholy compact that anyone shall have a sacred right to take the property of a third person to pay the debts of another. To prevent this kind of outrage many curative acts have been passed in furtherance of justice; and very much to the relief of the courts which cannot but mourn over acts of injustice, especially when inflicted in the name of the law. It is not in vain that government enforces contracts. The educational influence is so great that the more contracts that are made the better will they be kept. At present in this country it would not perhaps be too much to say that on an average not one contract out of a million ever finds its way into the courts.

In Gunn *v.* Barry and cases of that sort it was held that an exemption law could not be made to operate so as to cut off or diminish the rights of existing creditors; because when contracts are made the pecuniary condition of one or other or both of the parties enters largely into the inducement to make it; hence the court in Gunn *v.*

Barry said: "The legal remedies for the enforcement of a contract which belong to it at the time and place where it is made are a part of its obligation."

When plaintiffs in error made their contract—if there was a contract (even that does not appear)—they had a right to rely on the pecuniary resources of Blocker; but they had no right to expect that the law would issue to them letters of marque and reprisal to enable them to ravage the property of third persons; and so they are not the victims of bad faith, as we are feelingly told. If they had had a contract with the defendant in error the case would have been different; for the right to contract and the sacredness of contracts lie at the foundation of all civil government.

5. "The standard of moral right or wrong in the minds of men is variant."

Not so variant but that it would be universally held that it is morally wrong for A by force to take the property of B to pay the debt of C. It has been often said by the courts that a wrong is none the less a wrong because perpetrated under the forms of the law. Sometimes, it is true, in the administration of justice, general rules operate harshly on individuals; but such cases are rare, and should be reduced to a minimum. It is not at all difficult to tell who paid for the cattle, if that is a matter of any concern.

6. "The only way which they (the Evans-Snider-Buel Company) found to open this vested right and interest to doubt or to controversy was to secure this arbitrary act of Congress boldly taking it (the property attached) from the defendants in error, and transferring it to this mortgagee."

The act is a general act; and there is nothing to show that its passage was procured by improper means—if such evidence was admissible. We have sometimes seen it asserted in newspapers that the national destiny was being deflected by the influence of vast aggre-

gations of capital; but never that the august co-ordinate could be moved from the path of duty by a herd of cattle on a western prairie. Very many such statutes have been passed in this country; and they have always been favorably construed.

Of course if every one that makes a grab and gets hold of the property of a third person thereby obtains a "vested right"—whatever that may be— it will be found that most curative acts can be evaded by a lot of men who are neither innocent nor purchasers, but who for interested purposes masquerade under the guise of such.

Moreover, it is said to be a principle quite elementary that fraud alone, however dark, will not justify an action, but that it must be also shown that the plaintiff has suffered some injury thereby. (Clarke *v.* White, 12 Pet., 178.) Admitting then that it was a fraud for the plaintiff to make the advances and take the mortgages, how have the plaintiffs been injured by these acts?

XVII.

All of the questions arising in this controversy were decided in our favor in a case involving precisely the same identical statute relating to registration of mortgages. That decision was rendered by this court just fifty years ago; and it has never been overruled, or even criticised.

We refer to the case of Fowler *v.* Merrill, 11 How., 375 (1850), an Arkansas case.

Merrill brought suit to foreclose a mortgage executed by F. L. Dawson, dated November 25, 1837, on certain slaves, alleging that James L. Dawson, James Smith, William Dawson and others had since got possession of the slaves, "and that, although they were bought *with full notice of Merrill's prior rights to them under the above mortgage,* yet the respondents all refuse to deliver them to him, or pay their value and hire toward the discharge of the mortgage. Wherefore he prayed that each of them be required to deliver up the negroes in his possession, and account for their hire, or to pay for their value."

The defendants claimed under an execution sale on judgment against the mortgagor, made for payment of a debt, in October, 1841. It was claimed by them that as there was no valid registry of the mortgage, and as the slaves were left in possession of the mortgagor, and as they "were innocent purchasers, and without notice of the mortgage, the latter was consequently void."

The mortgage was acknowledged, and was registered November 24, 1837; *but at that time there was no statute providing for the registration of mortgages.* The statute first providing for registration was approved February 20, 1838.

Rev. Stat. Ark., p. 580.

But by a provision contained in the Revised Statutes (Ch. 129, sec. 5) it was declared that all the chapters, though approved on different days, should "be deemed to have been passed on the same day," and that they should all take effect from a day to be fixed by proclamation of the governor (*id., sec. 25*). By this proclamation, afterwards made, the Revised Statutes went into effect March 11, 1839, *over a year after the mortgage was registered.*

Though there was no law that would admit of the registry of the mortgage until more than a year after it was recorded, the court say:

"Such a registry, however, still tended to give publicity and notice of the mortgage, and to prevent as well as repel fraud; and it would, under the statute of frauds in Arkansas, *make the sale valid,* if *bona fide* and for *good consideration, unless against subsequent purchasers without notice,*" citing the section of the statute, *ante,* p. 19.

As to notice the court held that each of the defendants had actual notice, "proclaimed publicly at the sale" under which they bought, and otherwise; saying, in speaking of their purchase after this notice:

"According to some cases this conduct of theirs under such circumstances would seem more fraudulent than any by Merrill," citing Le Neve *v.* Le Neve, 3 Atk., 646, and other cases."

As to the objection that possession was not delivered to the mortgagee, the court said:

" * * * In conditional sales, especially on a condition precedent *bona fide,* the vendor, it is usually considered, ought not to part with the possession till the condition is fulfilled."

As to the registration the court held that although originally invalid, yet when a statute providing for registration of mortgages of like kind went into effect, the former registration was validated;

and that additional registration was not necessary. *This gave to the statute precisely the effect of a curative act.*

At that time the constitution of the State contained this provision:

"That no free man shall be * * * deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land."

Const. Ark. 1836, art. II, sec. 10.

This constitutional provision is the precise equivalent of the Fifth Amendment to the Federal constitution. If then the legislature could pass an act which indirectly had the effect of a curative act, it could have done the same thing directly; and the powers of Congress are equally extensive. How then can it be said that Congress had not power to pass the curative act in question?

As this case also holds that the mortgage was not void because the possession of the property was not delivered to the mortgagee, it effectually disposes of the case of Watson *v.* Thompson Lumber Co.

The resemblance between the case of Fowler *v.* Merrill and that now before the court is most striking.

Considering the unusual state of the facts, and that the same questions arise on the same statute, with an interval of half a century, it is probable that the coincidence could not be matched in the whole range of jurisprudence.

Respectfully,

U. M. ROSE,
W. E. HEMINGWAY,
G. B. ROSE,
For Defendant in Error.

IN THE

Supreme Court of the United States,

October Term, 1900.

WILLIAM H. McFADDEN, *in his own right,* W. P. McFADDEN AND JAMES McFADDEN, *executors of* WILLIAM McFADDEN, *Deceased*.. .. ..*Plaintiffs in Error.*

v. **No. 520.**

EVANS-SNIDER-BUEL COMPANY, C. W. TURNER, H. B. SPALDING ET AL.

Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Additional Brief for Defendants in Error.

We called attention in former brief (p. 5), to the fact that the answer to the intervention did not allege fraud, or that the chattels remained in possession of the mortgagors. On the contrary the answer denies "that the Evans-Snider-Buel Company are the owners of or entitled to the possession

of the cattle levied upon by the marshal under the writ of attachment in this cause." Tr., p. 7. The transcript wholly fails to show that the questions presented here were raised in the trial court.

It may also be noted that the attachment in this case was issued June 17, 1896, at which time none of the debts secured by the mortgages had matured.

The first case that came up under the registration laws of Arkansas was *Merrill v. Dawson, Hempstead,* 563, decided June 3, 1847, in which the court held that actual notice of the mortgage bound the execution purchasers, citing the second section of the act in the *Revised Statutes.* See synopsis hereto annexed, page 7.

The next case was *Main v. Alexander,* 9 *Ark.,* 112, July term, 1848, holding the reverse. The court evidently knew nothing about the ruling made in *Merrill v. Dawson,* which was not published until 1856.

The next case was *Fowler v. Merrill,* 11 *How.,* 375, 1850, the same case as *Merrill v. Dawson, supra,* on error. The court affirmed the decree below, holding that actual notice of the unrecorded mortgage bound the execution purchaser, citing the seventh section of the *Revised Statutes.* Synopsis, page 8.

Turning to the original report we find that Mr. Lawrence, of counsel for the execution creditors, cited for the consideration of this court Main *v.* Alexander more than once, as conclusive of the controversy, urging that "the decisions of the State court on its own statutes is the rule of the United States Courts." Pp. 385, 386, 387.

The court refused to follow Main v. Alexander, because the Supreme Court of Arkansas had overlooked decisive provisions of the statute.

The next case was *Byers v. Engles,* 16 *Ark.,* 543, June term, 1855. It is certainly very singular that the court in deciding that case had no knowledge of the case of *Fowler v. Merrill,* though the volume — 11 Howard — had been published in 1851. It is by no means singular that it reached precisely the same conclusion that had been previously reached by this court, and on the same grounds.

It will be seen that in the act of 1846 (synopsis, p. 8) actual notice as to purchasers is made equivalent to registration; but the words "without actual notice thereof" are not repeated in the subsequent clause relating to creditors; it was however construed as applying equally to both clauses, as it would have been an absurdity to give creditors a higher position than innocent purchasers.

Byers *v.* Engles, 16 Ark., 547.

The act of 1846 (synopsis, p. 8), which only relates to lands, did not repeal sections 2 and 7 of the original act; and both acts still remain in force; and they have both been carried through several official digests down to the last, that of 1894, Sandels & Hill's Digest, secs. 3473, 3475, 3477, 728.

If this court in 1850 would not follow *Main v. Alexander,* it is difficult to say why it should do so now when the statutes remain wholly unchanged, and when the Supreme Court of Arkansas has repeatedly expressed a regret that that decision was ever made. See former brief, p. 22.

There was another reason why this court could not follow *Main v. Alexander.* The rule established in *Le Neve v. Le Neve* and in *Byers v. Engles* was an equitable one, not dependent on the statute; for no registry statute could be more stringent than the one applied in *Le Neve v. Le Neve.* The rule that an executon plaintiff buying with notice of a prior conveyance is a *mala fide* purchaser was not applied at law in England previous to the late Judicature Act; but in this country it has been applied both at law and in equity. Former brief, p. 17.

Byers v. Engles and *Fowler v. Merrill* were both cases in equity; but since 1868, when the reformed code procedure was adopted in Arkansas, if a case at law involves equitable principles they are applied just as if the cause was heard in equity.

Mansfield's Digest, secs. 4925-4929.

Pollock *v.* Taylor, 26 Ark., 54.

Organ *v.* Ry., 51 id., 260.

Counsel for plaintiff in error rely on *section* 721 *Revised Stat. U. S.,* providing that "The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision."

But this statute does not apply to equitable proceedings.

Bucher *v.* Ry., 125 U. S., 582.

Russell *v.* Southard, 12 How., 147.

Neves *v.* Scott, 13 id., 272.

Nor does this statute apply to questions of a general nature.

Boyce *v.* Tabb, 18 Wall., 546.

Olcott *v.* Supervisors, 16 id., 688.

Hough *v.* Ry., 100 U. S., 225, 226.

But the principle applied in *Byers v. Engles* has been applied also at law in Arkansas.

Wilson *v.* Slaughter, 53 Ark., 139.

Williams *v.* McIlroy, 34 id., 92.

As this court decided this question so long ago it is not bound now to follow State decisions which are discordant and fluctuating.

Pana *v.* Bowler, 107 U. S., 540.

The rule that the legislature in adopting a statute from another State is presumed to adopt the construction previously placed upon it, is of course a pure fiction, which ought not to be allowed to work any wrong. It ought not to apply in this case because it is obvious that in deciding *Main v. Alexander* the court overlooked important and decisive statutes; as was held by this court more than half a century ago. These statutes were in force on the 2d of May, 1890, and under the act of Congress they emigrated to the Indian Territory. Add to this that the Supreme Court of Arkansas has often regretted the unlucky decision in Main *v.* Alexander, then certainly the question now presented is one of easy solution.

Counsel argue that the case of Watson *v.* Thompson Lumber Co., 49 Ark., 83, 1886, settled the law that a mortgage is void if the mortgagee remains in possession; such possession being evidence of fraud. But the opinion contains no intimation of a purpose to overrule previous decisions settling that question the other way (see former brief, p. 39), followed

in *Tennant v. Watson,* 58 *Ark.,* 252, *Ames Iron Works v. Kalamazoo Pulley Co.,* 63 *id.,* 87. Certainly if one purchasing at his own attachment sale only gets what estate the debtor had at the time his lien attached, he cannot be in any better plight before the sale. That retention of possession even in case of a sale of chattels may be explained was also held in Valley Distilling Co. *v.* Atkins, 50 id., 289, Shaul *v.* Harrington, 54 id., 307, White *v.* McCracken, 60 id., 616, Adler-Goldman Co. *v.* Phillips, 63 id., 41, and Hight *v.* Harris, 56 id., 98.

But if we could concede that the decision in the Watson Lumber Co. case really rests on the unexpressed notion that there was no change of possession, then the ruling would be in conflict with the plain language and meaning of the statute.

In Arkansas the law as to fraudulent conveyances has been reduced to statute.

Shaul *v.* Harrington, 54 Ark., 308.

The original act in the *Revised Statutes* contains the whole of that law; but sections 3 and 7 expressly declare that it shall not apply to purchasers with notice of prior rights, for the very good reason that they are themselves seeking to perpetrate a fraud.

We have shown in a former brief that the *Thompson Lumber Co.* case went off on a mistaken view of the registration law, based on cases wholly irrelevant. It did not purport to be based on the statute; and the court held that there was no statute applying to the case; which indeed is self-evident.

Moreover this court in *Fowler v. Merrill* held under the same statutes that retention of possession by the mortgagor did not establish a charge of fraud. The Supreme Court of Arkansas has often asserted the same principle.

It is consoling to reflect that the fangs have finally been drawn out of *Main v. Alexander.*

In *Leonhard v. Flood,* 68 *Ark.,* 162, it appeared that Flood and wife had given a mortgage to Leonhard; but the mortgage was not properly recorded; and the defendant, who had purchased from the mortgagors after the execution of the mortgage, pleaded that fact, and that it was no lien as to them.

The court said that there was evidence tending to show fraud in the sales to defendants; but added:

"*Leaving out the question of fraud,* our conclusion is supported in this case by another reason. Leonhard, by the note and mortgage, showed that he had a valid lien on the property as against Henry and Catherine Flood. The defendants, who claim as purchasers from them after the execution of the mortgage, must, in order to sustain their claim, show facts making such purchase superior to the rights of Leonhard; and to this they must show a consideration for such purchase." P. 168.

That is to say that the purchaser must show that he is a *bona fide* purchaser for value; but by an unbroken line of decisions in Arkansas an attaching or execution creditor is not a purchaser for value; certainly not when he has notice of a prior valid claim. Former brief, p. 26.

"If anyone has a right to property, such right is a perfect and exclusive right; but no one can have such right

before he has acquired a better right to the property than any other person in the world; a right therefore only to recover property cannot be called a perfect and exclusive right."

Calder *v.* Bull, 3 Dall., 394.

Bank of Hamilton *v.* Dudley, 2 Pet., 523.

In that case the court said:

"The mode of subjecting the property of a debtor to the demands of a creditor must always depend on the wisdom of the legislature."

It is impossible to decide the present case without reference to its moral aspects. In *Wilkinson v. Leland,* 2 *Pet.,* 661, the statute made valid a title that previously was absolutely void; the court saying: "The sale was ratified by the legislature not to destroy existing rights, but to effectuate them." Here the curative act was passed to make good the clearly moral right of the mortgagee.

All presumptions are in favor of its constitutionality.

Nichol *v.* Ames, 173 U. S., 509.

In *Sampeyrac v. U. S.,* 7 *Pet.,* 239, after time for filing a bill of review had expired Congress passed an act which validated the bill of review previously filed beyond the time limit in that case. The court said: "But the act in terms applies to bills filed or to be filed; and of course cures this defect, if any existed. Such retrospective effect is no unusual course in laws providing new remedies. * * * It therefore forms no objection to the law that the cause of action existed antecedent to its passage, so far as it applies to the remedy, and does not affect the right."

That case arose and was decided when Arkansas was still a territory.

In speaking of *Watson v. Mercer,* 8 *Pet.,* 88, and *Satterlee v. Matthewson,* 2 *id.,* 380, counsel say (brief, p. 11) that these decisions would not have been made if the XIV Amendment had then been in force.

There is nothing in that contention. Both cases were from Pennsylvania, and originated while the Constitution of 1790 was in force, which separated the departments of government, and provided (sec. 11, art. 9): "That all courts shall be open, and every man for an injury done him in his lands, goods, person, or reputation *shall have remedy by due course of law,* and right and justice administered without sale, denial or delay."

2 Poore, Constitutions, 1555.

Of course both the clause in the XIV Amendment and this clause in the Pennsylvania Constitution are derived from the Magna Charta; and their meaning is the same. Thus construed:

Pickering *v.* Rutty, 1 S. & R., 510 (1815).

Trustees *v.* Robinson, 12 id., 29, 34 (1824).

Counsel say that "The attaching creditor in this case stands on the same footing as a purchaser for value." Brief, p. 22. If that is so then the attaching creditor *is* a purchaser for value. He cannot be anything more. But in *Byers v. Engles,* 16 *Ark.,* 543, it was held that one was not a purchaser for value if he had notice of an outstanding title at any time before the sale; and in *Fowler v. Merrill,* 11 *How.,* 395, the court held that notice at any time before payment of the purchase money by the purchaser under execution defeated his claim to be an innocent purchaser. The case made in *Byers v. Engles* did not call for the full statement of

the rule; but in other cases the principle thus enounced in *Fowler v. Merrill* has often been affirmed.

Byers *v.* Fowler, 12 Ark., 286, 1851.

Duncan *v.* Jordan, 13 id., 190.

Pond *v.* Obaugh, 16 id., 96.

Massie *v.* Enyart, 32 id., 257.

Whiting *v.* Beebe, 12 id., 552.

The same authorities show that no one is an innocent purchaser who has not acquired the legal title. Also

Smith *v.* Orton, 131 U. S., lxxv.

In some of the States creditors and *bona fide* purchasers without notice have been placed on the same footing; but that was a mistake.

Lowell, Transfers of Stock, sec. 104.

There is no trace of such a doctrine in Arkansas; and it was expressly repudiated in *Byers v. Engles.*

The first case cited by counsel for defendant in error, *Pyeatt v. Powell,* 51 *Fed.,* 551, is destructive of their whole contention. McClellan mortgaged the horses mentioned to Powell July 18, 1888. McClellan at that time lived in the Indian Territory, and the horses were there; but the mortgage was executed in Kansas. It was not recorded in Kansas, and it was not recorded in the Indian Territory because there was no law there for the registration of any mortgage. The marshal of the Indian Territory on the 4th of October, 1889, levied on the horses under an execution in favor of Pyeatt and Kirby; and Powell sued the marshal in the United States Court for the Indian Territory in replevin. By amendment Pyeatt and Kirby were made defendants in place of the marshal.

Here we have the same state of facts existing in the present controversy; a controversy between a mortgagee holding under an unrecorded mortgage and defendants claiming under a levy.

The court held that there was no need to record the mortgage in Kansas, that the case was to be settled according to common law rules, there being no registry laws in the Indian Territory; and that, it being shown that the mortgage was fair and free from fraud, the right of the mortgagee was superior to that of the plaintiff in the execution. Sanborn, J., delivering the opinion of the court, said (p. 554):

"The primary question on trial was whether plaintiff or defendants were entitled to the possession of the property; and this mortgage if valid, and its past due debt, if unpaid, established the plaintiff's contention. * * * A chattel mortgage, not fraudulent as to creditors, made in good faith, to secure an honest debt, is at common law superior to a subsequent attachment of the same property by a creditor of the mortgagor."

The court also held that this was true whether the attaching creditor had notice or not. P. 556.

It is true that the court in the statement of facts said that there was evidence tending to show that the mortgagee took possession of the property before the levy; but that question was not raised or presented in any way in the two instructions excepted to, was not before the court, and was not made a basis of the decision.

By levy of attachment plaintiff only acquired a lien on the equity of redemption; and his levy did not amplify the estate of the defendant.

Vattier *v.* Hinde, 7 Pet., 271.

Boone *v.* Chiles, 10 id., 212.

Wallace *v.* Bartle, 21 Iowa, 346; 89 Am. Dec., 584.

Bush *v.* Bush, 3 Strobh., Eq., 131; 51 Am. Dec., 675.

Walton *v.* Hargroves, 42 Miss., 18; 97 Am. Dec., 429 and note.

The purchaser at an attachment sale, even without notice, does not stand in the position of a *bona fide* holder of commercial paper.

Klatt *v.* Dummert (Minn.), 73 N. W., 404.

"Attachment constitutes a lien merely upon land; but the general property of the owner is not divested."

Merrick *v.* Hutt, 15 Ark., 344.

"An attaching creditor is not a subsequent purchaser for value; and an unrecorded deed or other instrument creating a lien will take precedence over a subsequent attachment."

Rea *v.* Wilson (Iowa), 84 N. W., 539.

Murphy *v.* Plankinton Bank, 13 S. D., 501; 83 N. W., 575.

Hodgson *v.* Libby (N. H.), 43 Atl., 322.

Karger *v.* Steele-Wedeles Co. (Wis.), 79 N. W., 216.

Undoubtedly so where the attaching creditor has notice.

Nat. Loan Co. *v.* Blair (Va.), 36 S. E., 513.

Barnett *v.* Squyres (Texas), 54 S. W., 241.

Clift *v.* Williams (Ky.), 40 S. W., 328.

"Notice to a subsequent purchaser or mortgagee before completion of the sale or mortgage of an unrecorded mortgage is conclusive evidence of *mala fides* on his part."

Jones, Chat. Mortg., sec. 312, and many cases cited.

So a legislative grant of immunity from taxation for a fixed period does not create a vested right.

Citizens Bank *v.* Owensboro, 173 U. S., 643.

Rights "are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event."

Pearsall *v.* Ry., 161 U. S., 673.

Bank of Commerce *v.* Tennessee, 163 id., 422.

"Levying an attachment has the double effect of creating a lien and instituting an action. But the lien is only inchoate."

Pratt *v.* Law, 9 Cranch, 456, 497.

"*Inchoate*: Recently or just begun; beginning; incipient; partially, but not fully in existence or operation; existing in its elements; incomplete."—*Webster.*

"Between property rights * * * and expectations of benefits from continuance of existing legislation there is as wide a difference as between realization and hopes."

Chinese Exclusion Case, 130 U. S., 609, 610.

EXAMPLES: Inchoate right of curtesy.

Percy *v.* Cockrill, 53 Fed., 881.

Act providing for payment of judgment against bank in its own bills.

Blount *v.* Windley, 95 U. S., 173.

Repeal of act allowing a second trial in ejectment.

People *v.* District Court (Colo.), 63 Pac., 321.

Repeal of appraisement law.

Phelps Co. *v.* N. Am. Trust Co. (Kan.), 64 id., 63.

Repeal of law giving statutory penalty.

Dunham *v.* Anders (N. C.), 38 S. E., 832.

Repeal of statute forbidding foreign corporation to sue.

Clark *v.* Durr (Ind.), 60 N. E., 688.

Abolishing right of distress.

Van Rensselaer *v.* Snyder, 13 N. Y., 299.

Where statute allowing appeal expires.

Yeaton *v.* U. S., 5 Cranch, 281.

Occupation of lands under pre-emption laws before payment of purchase money.

Frisbie *v.* Whitney, 9 Wall., 187.

An attachment lien is certainly not property; and no one ever heard of the sale or assignment of such a lien.

The fact that an act is retrospective leads to no inferences that it is void.

Stephens *v.* Cherokee Nation, 174 U. S., 446.

Gross *v.* U. S. Mortgage Co., 108 id., 488.

That Congress had the power to pass the curative act in this case is settled by the decision in *Williams v. Paine*, 169 *U. S.*, 79. There the lands lay within the District of Columbia, and the act was passed by Congress. The court said: "The (curative) statute applies where the parties intended to convey, thought they had conveyed, and yet had not complied with the requisites necessary to make the conveyance in all things effectual. In such case, especially where the consideration for the instrument has been received and retained, curative statutes may be passed which give validity to the defective instruments to the same extent as was intended by the parties at the time they were executed."

The many cases relating to curative acts, except in States having constitutional provisions forbidding the passage of retroactive laws, are thus summed up by the Court of Appeals of New York:

"This (the passing of a curative act) would be no greater exercise of power than the abolition of the right of distress for rent, or the lien of the landlord on property taken in execution or of the right of imprisoning the debtor. Yet the validity of such laws has been fully recognized even where they affected existing claims or judgments. They do not take away property, or affect the obligation of contracts."

Rapallo, J., in Watson *v.* Ry., 47 N. Y., 157.

The cases seemingly in point cited by counsel for plaintiff in error are cases from States whose Constitutions forbid retroactive laws, cases of judgments rendered on contracts, and cases from States where in case of sales and mortgages want of change of possession is made, by statute or otherwise, conclusive evidence of fraud; to which may be added two or three unconsidered *dicta*.

Counsel for plaintiff in error have displayed commendable zeal in their search for authorities; but those that they have discovered do not sustain the positions that counsel assume. To prove this assertion we are forced to examine the cases cited one by one. Finding them difficult of classification, we refer to them alphabetically; referring also to the pages of the brief in which they are cited.

Allison v. Ry., 9 *Bush*, 248 (brief, p. 35). A case of legislative usurpation of judicial functions in declaring certain county bonds valid.

Barrett v. Barrett (*N. C.*), 26 *S. E.*, 691 (brief, p. 31). The court expressly held the curative act valid; and said that no question arose as to rights of third persons.

Baumbach v. Singer (*Wis.*), 56 *N. W.*, 872 (brief, p. 35). Holds that curative act making invalid bond valid does not apply to judgments previously rendered. No judgment had been rendered against the defendant in error in this case when the curative act was passed. We have already shown that the judgment against Blocker is wholly irrelevant to the present controversy, in which the intervener claims against both the plaintiff and the defendant. Former brief, p. 5.

Bergman v. Sells, 39 *Ark.*, 97 (brief, p. 14). One who buys chattels before service of garnishment gets a good title.

Bigelow v. Topliff, 25 *Vt.*, 273, 60 *Am. Dec.*, 264 (brief, p. 31). This case was expressly overruled in Hackett *v.* Callender, 32 Vt., 108. See our former brief, p. 78.

Bishop v. Schneider, 46 *Mo.*, 472, 2 *Am. R.*, 533 (brief, p. 29). Holds that the registry of an unacknowledged deed imparts no notice; that a statute containing the word "heretofore" is retrospective; that the insufficiency of the acknowledgment could only avail a purchaser for a valuable consideration, which must be alleged in the answer, showing that the purchase money had been paid before notice.

Brinton v. Seevers, 12 *Iowa*, 392 (brief, p. 17). Placed expressly on the ground that the sale had been completed, the deed made and the purchase money paid; and that the curative act impaired the obligation of the contract thus completed.

Burch v. Newberry, 10 *N. Y.,* 374 (brief, p. 35). Act extending time for appeal which had previously expired held void.

Sampeyrac *v.* U. S., 7 Pet., 222 *contra.*

Also 3 Rose's Notes, p. 366.

Burt v. Williams, 24 *Ark.,* 91, 1862 (brief, p. 34). Decides that a statute continuing all suits until close of the war is unconstitutional.

Blaver v. Frick Co., 53 *Ark.,* 8 (brief p. 38). A mortgage registered in the wrong district imparts no notice.

Bostwick v. Blake (*Ill.*), 34 *N. E.,* 38 (brief, p. 23). Only decides that where no answer was filed to intervention but the parties proceeded as if there had been an answer, under the Illinois statute the question of fraud must be considered as having been put in issue.

Burnell v. Robertson, 5 *Gilman,* 289 (brief, p. 30). Placed solely on the ground that by statute the sale of chattels without delivery was void. P. 288.

Byers v. Engles, 16 *Ark.,* 543 (brief, p. 25). Counsel say that mortgages of chattels were governed by an entirely different statute. We have seen that the entire Revised Statutes were but one act. Sections 2, 3, 6, 7, of ch. 101 of the Revised Statutes expressly apply to conveyance of "any interest in goods and chattels." See synopsis appended hereto, pp. 7, 8.

Chestnut v. Shane, 16 *Ohio,* 599 (brief, p. 17). Curative act was sustained. Court said, only in a general way that such acts cannot divest vested rights, without giving any instance.

Cole v. Cunningham, 133 *U. S.,* 116 (brief, p. 14). Court expressly say that attachment lien is only inchoate.

Conrad v. Smith (*N. D.*), 70 *N. W.,* 815 (brief, p. 33). Statute made sale void because no change of possession. The court held that the second act was not intended to be retrospective. P. 817. See S. C., 51 N. W., 720.

Commissioners v. Rosche, 50 *Ohio St.,* 103, 40 *Am. St.,* 653 (brief, p. 17). Statute purported to create contractual liability where none had previously existed. Besides, the Constitution forbade the passage of "retroactive laws." P. 656, 40 Am. St. R.

Cowley v. McLaughlin (*Mass.*), 4 *N. E.,* 821 (brief, p. 29). "By a stretch an attaching creditor is regarded as in the light of a *bona fide* purchaser." That never was the law in Arkansas. Former brief, pp. 26-29. The case is in our favor.

Cross v. Fombey, 46 *Ark.,* 49 (brief, p. 21). Attachment lien is sustained by judgment. Certainly as between the parties.

Daggy v. Ball (*Ind.*), 34 *N. E.,* 246 (brief, p. 36). Held under statute giving lien on land for digging ditches, that repeal of the statute did not destroy lien previously accruing. This was decided on the language of the repealing statute; and the court expressly refrained from passing on the question as to vested rights. P. 247, second column.

Day v. Madden (*Colo.*), 48 *Pac.,* 15 (brief, p. 15). The decision is placed expressly on the ground that the Colorado Constitution forbids the passage of retrospective laws.

Deininger v. McDonnell, 41 *Ill.,* 227 (brief, p. 31). The act did not purport to be retroactive. So held. Nothing about liens.

Ely v. Holton, 15 *N. Y.,* 595 (brief, p. 36). In amendatory act the word "hereafter" relates to the date of that act, and not to the date of the act amended.

Fabri v. Murphy, 95 *U. S.,* 191 (brief, p. 36). No possible relevancy.

Files v. Fuller, 44 *Ark.,* 281 (brief, p. 36). No legislature can limit future legistatures. P. 280. Repeal of statute does not destroy claim for attorneys' fees, on two grounds: (1) That was not the legislative intent (p. 282); (2) the fees were due under a contract. Pp. 281-283.

Freiberg v. Singer (*Wis.*), 63 *N. W.,* 754 (brief, p. 17). Held that until judgment the legislature could by curative act take away rights obtained through garnishment. That did not mean a judgment against some or any third person as that against Blocker in this case.

Frellson v. Green, 19 *Ark.,* 376 (brief, p. 14). No rights of any third person intervened.

Goore v. McDaniel, 1 *McCord,* 480 (brief, p. 17). Only decides that a senior attachment is not displaced by a junior execution.

Goshen v. Stonington, 4 *Conn.,* 209, 10 *Am. Dec.,* 121 (brief, p. 14). Act validating former marriages held good.

Granger v. Adams, 90 *Ind.,* 87 (brief, p. 38). Same as last case. Statute required change of possession.

Green v. Drinker, 4 *Watts & S.,* 440 (brief, p. 31). The act did not purport to be retrospective. So held.

Green v. Van Buskirk, 7 *Wall.,* 139 (brief, p. 30). Decided under Illinois statutes, making change of possession necessary, and giving attaching creditor rights of *bona fide* purchaser. P. 146.

Griggs v. Banks, 59 *Ala.,* 311 (brief, p. 15). The court said: "It (the attachment lien) was not, however, *property, or a right of property, etc.* P. 316.

Grove v. Todd, 41 *Md.,* 633, 20*Am. R.,* 76 (brief, p. 32). Held that curative act could not cure defective acknowledgment of wife, even where no third persons were concerned. This is against nearly all of the authorities, including a number of decisions of this court.

Hall v. Stevens, 65 *Mo.,* 670 (brief, p. 17). See what is said by court below as to this case. (Tr., p. 87.)

Hannahs v. Felts, 15 *Iowa,* 143 (brief, p. 17). See what is said about this case by court below. (Tr., p. 87.) A pure *dictum,* as the court said that the act did not include attachments.

Harrison v. Trader, 29 *Ark.,* 92 (brief, p. 15). The court expressly said that there was no claim by any third party in that case. P. 93.

Hill v. Baker, 32 *Iowa,* 311 (brief, p. 32). Only decides that deed in attachment sales relates back to time of levy.

Hunter-Hutton-Evans Com. Co. v. Quigg, see *Strayhorn-Evans Com. Co. v. Quigg.*

Jones v. Graham, 77 *N. Y.,* 628 (brief, p. 27). Only decides that a mortgage given for a pre-existing debt does not give the mortgagee the position of a holder in good faith.

Kelly v. Dill, 23 *Minn.,* 435 (brief, p. 17). Only decides that "the owner cannot, by making the land his homestead," defeat a prior attachment.

Kennerly v. Swarz (*Va.*), 3 *S. E.,* 348 (brief, p. 20). Decides that a homestead in land cannot be acquired after judgment lien attached.

Lackey v. Seibert, 23 *Mo.,* 85 (brief, p. 17). Only decides that judgment in attahcment proceedings relates back to the levy.

Lawson v. Jeffries, 47 *Miss.,* 686 (brief, p. 35). Decides that constitutional convention could not grant new trials in the courts.

Lowe v. Harris (*N. C.*), 17 *S. E.,* 539 (brief, p. 14). Has no possible application. It was a case of a contract, and the court based its decision on the clause in the Federal Constitution forbidding laws impairing the obligation of contracts. P. 540, col. 1.

Lyon v. Sanford, 5 *Conn.,* 547 (brief, p. 17). Only holds that an attaching creditor has a right to redeem from a decree to which he was not a party foreclosing a mortgage.

McKeithan v. Terry, 64 *N. C.,* 25 (brief, p. 19). New Constitution did not by adopting homestead feature divest lien created by prior execution. The court said that such was not the intent of the Constitution. P. 26.

Meighan v. Strong, 6 *Minn.,* 111 (brief, p. 31). No question as to liens of any kind.

Memphis Land and Timber Co. v. Ford, 7 *C. C. A.,* 29, 58 *Fed.,* 452 (brief, p. 29). Holds that actual notice of an unrecorded deed is equivalent to constructive notice.

Menges v. Dentler, 33 *Penn. St.,* 495 (brief, p. 35). Court had decided a certain sheriff's deed to be void. Later legislative act declaring it valid held to be unconstitutional.

In *Merchants Bank v. Ballou* (*Va.*), 32 *S. E.,* 481 (brief, p. 9), the decision was expressly based on the fact that the judgment was founded on a contract. But even that position is untenable as shown by numerous authorities cited in our former brief. As was said by the court below: "A writ of attachment is nothing more than a remedy afforded by law for the collection of a debt." (Tr., p. 87.)

Mulnix v. Spratler (*Colo.*), 50 *Pac.,* 1078 (brief, p. 15). Same thing. P. 1080. Constitution forbids retroactive laws.

National Bank v. Riethman, 79 *Fed.,* 582 (brief, p. 16). An attachment, "being a remedy provided by statute, and resting on the statute alone, an unconditional repeal of the statute before judgment, and while the lien still remains contingent, destroys the lien." P. 583.

People v. Cameron, 7 *Ill.,* 468 (brief, p. 17). Only holds that the giving a forthcoming bond does not dissolve the attachment lien.

Rainwater-Boogher Hat Co. v. Malcolm, 52 *Fed.,* 734 (brief, p. 22). Only decides that possession is equivalent to actual notice.

Ratcliffe v. Anderson, 31 *Gratt.,* 105, 31 *Am. R.,* 716 (brief, p. 35). Act authorizing the setting aside of all judgments rendered between January 1, 1862, and April 10, 1865, held void.

Richardson v. Adler, 46 *Ark.,* 49 (brief, p. 16). Decides that if defendant marries or becomes the head of a family after attachment levied on land he cannot claim it as a homestead.

Rodd v. Heartt, 21 *Wall.,* 558 (The Lottawana) (brief, p. 34). A lien is a right of property. "That is a rule in admiralty that distinguishes admiralty liens from all others." Ben., Adm. (3d ed.), secs. 271, 290, 305.

In *Ryan v. Maxey* (*Mont.*), 35 *Pac.,* 515 (brief, p. 16), the act referred to did not purport to be retrospective.

Secard v. Davis, 6 *Pet.,* 124 (brief, p. 29). The court held that actual notice is equivalent to constructive notice. P. 139.

Sidway v. Lawson, 58 *Ark.,* 117 (brief, p. 35). Expressly held that the legislature may cure defective conveyances, and that such acts apply to pending suits.

Steamship Co. v. Joliffe, 2 *Wall.,* 457 (brief, p. 13). The plaintiff in error has no claim against defendant in error arising "upon a contract or a transaction in the nature of a contract."

Smith v. Moore, 11 *N. H.,* 55 (brief, p. 38). Statute required change of possession. P. 65.

Stansel v. Roberts, 13 *Ohio,* 148, 42 *Am. Dec.,* 193 (brief, p. 28). It is true that in Ohio the court adopted the rule that actual notice is not a substitute for constructive notice; also that the court afterwards regretted having done so. See former brief, p. 23.

Stewart v. Platt, 101 *U. S.,* 731 (brief, p. 28). A New York case. The statute required delivery of possession in case of an unrecorded mortgage. There never was any such law in Arkansas.

Strayhorn-Hutton-Evans Com. Co. v. Quigg, 97 *Fed.*, 735 (brief, p. 28). To read the opinion in this case one might suppose that by law in Arkansas change of possession was necessary to validate a mortgage; but the court do not say so. That never was the law in Arkansas. "The provision in a deed of trust that the property shall remain in the possession of the grantor until default of payment is no evidence of fraud if, under all the circumstances, the time for payment and sale be not unreasonable."

Hempstead *v.* Johnson, 18 Ark., 123, 1856.

See former brief, p. 40. Also

Valley Distilling Co. *v.* Atkins, 50 id., 291.

Puckett *v.* Reed, 31 Ark., 131, 1876.

Shaul *v.* Harrington, 54 id., 307.

White *v.* McCracken, 69 id., 617.

In view of this notorious principle of local law, entirely conformable to the rulings of this court, it is obvious that the court in the Quigg case meant that there was no such possession as to amount to notice to third persons, and not that the mortgage was void. A like case is Bank of Black Rock *v.* Decker, 65 Ark., 33. In both cases there was no notice except that claimed to arise from possession; and that was not sufficient.

In the Quigg case there was nothing to prevent the mortgagee, who was, it would seem, a resident of the Indian Territory, from having his mortgage recorded.

Summer v. Mitchell (*Fla.*), 10 *So.*, 562 (brief, p. 9). Counsel have entirely misunderstood this case. The curative act made acknowledgment in other States valid to convey

lands in Florida if taken according to the laws of such other States; and the act was held to be valid. Moreover the court cited with approval the very cases on which we rely:

Green *v.* Abrahams, 43 Ark., 420.

Johnson *v.* Richardson, 44 id., 365 (p. 567, col. 1).

Fowler *v.* Merrill, 11 How., 375 (p. 571, col 2).

Tillotson v. Millard, 7 *Minn.,* 513 (brief, p. 17). The act did not purport to be retroactive, and the claim of the defendant was without equity.

Travis v. Bishop, 13 *Metc.,* 304 (brief, p. 26). Has no application, since the statute of Massachusetts provides that "no mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, *unless possession of the mortgaged property be delivered to, and retained by the mortgagee,* or unless the said mortgage be recorded in the office of the clerk," etc.

Bullock *v.* Williams, 16 Pick., 33.

Tyrell v. Rountree, 7 *Pet.,* 464 (brief, p. 18). The act in that case did not purport to divest the lien, and it was not a curative act.

U. S. v. Williams (*Mont.*), 19 *Pac.,* 287 (brief, p. 36). Suit by the United States for value of timber cut on public lands. After timber had been cut, and right of action had accrued, a repealing act was passed. Held that the right of action still subsisted.

Warren v. Jones, 9 *Rich.,* 288 (brief, p. 20). The act did not purport to be retroactive, and the court so held.

Watson v. Lumber Co., 49 *Ark.,* 83 (brief, p. 24). Granting all that counsel say this decision did not change the rule as to the validity of curative statutes as laid down in many cases.

Green *v.* Abrahams, 43 id., 624.

Apel *v.* Kelsey, 47 id., 420.

Cupp *v.* Welch, 50 id., 297.

State *v.* Hicks, 48 id., 519.

Sidway *v.* Lawson, 58 id., 121.

Bryan *v.* Bryan, 62 id., 83.

Hill *v.* Yarborough, id., 324.

Bluff City Lumber Co. *v.* Bloom, 64 id., 495.

Steers *v.* Kinsey, 68 id., 361.

Johnson *v.* Richardson, 44 id., 365.

British Mortgage Co. *v.* Winchell, 62 id., 160.

Williamson v. Ry., 29 *N. J. Eq.*, 306 (brief, p. 17). The court expressly said: "The act of 1876 itself does not necessarily require a retrospective construction, and *therefore* will not be allowed that effect." P. 335. The registration act required registration or change of possession. P. 332.

Willis v. Crooker, 1 *Pick.*, 204 (brief, p. 15). Contest between first and attaching creditors. No constitutional question was involved or decided.

As to cases like *Gunn v. Barry*, 15 *Wall.*, 610 (brief, p. 20), based on judgments on contracts, they have no application.

"A judgment is a contract." (Brief, p. 37.) This assertion implies unusual intrepidity in view of the decisions of this court. Former brief, p. 75.

But if the judgment against Blocker was a contract we are not seeking to impair it, as it does not bind the intervener.

It must be clear that if Congress possessed the power over the territories asserted by counsel (brief, p. 43), it certainly has power to pass the curative act in question. The

need for acts of that kind must more frequently occur in such communities than in older ones where laws have been more fully developed and individual rights have been more accurately defined.

Counsel say: "In passing curative statutes the legislature only assumes to do for the debtor what he might have been compelled to do by a court of chancery." P. 33.

It is needless to say that the authorities cited do not limit legislative power to that exercised by courts of chancery.

Counsel say: "It is perfectly clear from the recording act * * * that general creditors enforcing a lien and subsequent purchasers in good faith are put on the same footing, and each has the equal right to take advantage of improperly recorded conveyances." P. 27.

And this just after citing Byers *v.* Engles, which held that a purchaser with actual notice is not an innocent purchaser at all.

No conduct could be more strictly moral and honorable than that of the defendant in error in this case. It advanced $132,000 to Blocker, being the whole amount of the purchase money. It is not surprising that the defect in the Arkansas statute escaped observation. The same thing happened in Fowler *v.* Merrill, 11 How., 375. In both cases the mortgagees registered their mortgages, though there was no law for their registration; but in both cases the registration had the effect to "prevent as well as repel fraud." In the Fowler case the mortgagee was ultimately protected by a statute that did not purport to be retrospective. In this case a mortgagee, equally innocent, is protected by a law in terms retro-

spective, and intended to effect the same just object accomplished in the Fowler case under the same statutes applicable here.

Notwithstanding the spotless and unblemished conduct of the defendants in error counsel for McFaddin make their brief ring with the cries of fraud; but this is not the first time that the cry of "stop thief" has been raised as a measure of protection. In the extremely languid and debilitated opinion delivered in Main *v.* Alexander it was said that the failure to see that a certificate of acknowledgment of a mortgage was defective was a fraud, meaning, we suppose, a constructive fraud, as most transparently there was no actual fraud, since the mortgagee, according to his best lights, did all he could to protect himself by publicity. The Supreme Court of Arkansas has never repeated that expression in any similar case, wisely refraining to add insult to injury.

Now how does the case stand with McFadden? From times remote — for Le Neve *v.* Le Neve, decided more than a hundred and fifty years ago, was based on prior decisions — it has been held that one who attempts to seize property by attachment or execution that he knows belongs to another than a defendant in the writ, is guilty of actual fraud. If, then, the defendant in error is constructively guilty of fraud, by what process of reasoning can the plaintiff in error be made constructively honest?

Respectfully,

U. M. ROSE,

W. E. HEMINGWAY,

G. B. ROSE,

For Defendants in Error.

NOTE.—As many decisions were referred to in our former brief, we endeavor to lighten the labors of the court by presenting the following synopsis, which also contains literal copies of the various sections of statutes referred to, so that the court may see them at a glance. The act of Congress extending the Arkansas statutes over the Indian Territory, is of date May 2, 1890. All Arkansas decisions reported up to volume 53, p. 247, were rendered before that time.

SYNOPSIS OF FORMER BRIEF FOR DEFENDANT IN ERROR.

I. Statement of facts. (Brief, p. 1.)

II. Federal statute extending Constitution and Laws of the United States over the Indian Territory. (Brief, p. 3.)

"Section 32. The Constitution of the United States, and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, and all laws relating to national banking associations, shall have the same force and effect in the Indian Territory as elsewhere in the United States."

26 Stat. U. S., 96; approved May 2, 1890. (Brief, p. 3.)

III. Federal statute extending Arkansas statute over the Indian Territory. (Brief, p. 3.)

"Section 31. That certain general laws of the State of Arkansas in force at the close of the session of the general assembly of that State of 1883, as published in 1884, in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act, or any act of Congress relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say, the provisions of the said general statutes of Arkansas relating to * * * Frauds, statute of * * * Mortgages, * * * chapter 110, to Recorders, chapter 126," and so on designating various other chapters, including Attachments.

26 Stat. U. S., 94; approved May 2, 1890.

The act of the Arkansas Legislature adopting the Revised Statutes of 1838 is as follows:

"The revised code by Wm. McK. Ball and Samuel C. Roane, Esqrs., printed under the superintendence of Albert Pike, be, and the same is hereby declared to be, the law of Arkansas; and the same shall be in force, and have effect, when the governor shall have issued his proclamation, prescribing the time for the same to take effect, as provided by the statute passed at the last session of the general assembly, entitled 'An act concerning the Revised Statutes.'"

Session Acts 1838, p. 27.

Under the governor's proclamation the Revised Statutes went into effect March 11, 1839.

Fowler *v.* Merrill, 11 How., 395.

"For the purpose of construction the Revised Statutes passed at the present session of the general assembly shall be deemed to have been passed on the same day, notwithstanding they may have been passed at different times."

Rev. Stat. Ark., p. 697. (Brief, p. 11.)

IV. The intervention of the mortgagees. Pleadings. (Brief, p. 4.)

(*a*) A separate issue is formed on the interplea. (Brief, p. 5.)

Deloach Milling Co. *v.* L. R. Milling Co., 65 Ark., 467.

(*b*) The issue now presented is between the interveners and the attaching plaintiffs alone; and the interveners are not affected by the judgment against the defendant in the attachment. (Brief, p. 5.)

Splawn *v.* Martin, 17 Id., 146.

Clinton *v.* Estes, 20 Id., 216.

Erb *v.* Cole, 31 Id., 554.

Southern Development Co. *v.* Sylva, 125 U. S., 247.

(*b*) Production of the mortgages and notes placed the burden of proof on the attaching creditors to show fraud or invalidity. (P. 8.)

Hempstead *v.* Johnson, 18 Ark., 123.

Hill *v.* Srygley, 51 Id., 57.

Cunningham *v.* Williams, 42 Id., 170.

Colorado Coal Co. *v.* U. S., 123 U. S., 307.

Stephens *v.* Oppenheimer, 45 Ark., 492.

Holt *v.* Moore, 37 Id., 146.

Fitzgerald *v.* Walker, 55 Id., 153.

Jones *v.* Simpson, 116 U. S., 615.

Walker *v.* Collins, 59 Fed., 70.

First National Bank *v.* Lowrey (Neb.), 54 N. W., 571.

VIII. Legislation and construction as to registration of deeds and mortgages in Arkansas. (Brief, p. 8.)

As to mortgages:

"Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

Rev. Stat., c. 101, sec. 2. (Brief, p. 11.)

Mansfield's Dig., sec. 4743.

The Revised Statutes also contains this section:

"All mortgages, whether for real or personal estate, shall be acknowledged before some person authorized by law to take the acknowledgment of deeds, and shall be recorded, if for lands, in the county or counties in which the lands lie; and, if for personal property, in the county in which the mortgagor resides."

Ch. 101, sec. 1; Mansfield's Dig., sec. 4742.

As to conveyances of all kinds:

"Section 2. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods and chattels, or things in action, or of any rents issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, and every bond, suit, judgment, decree or execution, made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts, or demands, as against creditors and purchasers prior and subsequent, shall be void."

Rev. Stat., c. 65.

Mansfield's Dig., sec. 3374.

"Section 3. No such conveyance or charge shall be deemed void in favor of an innocent subsequent purchaser, if the deed or conveyance shall have been duly acknowledged or proven and recorded, or the purchaser have actual notice thereof at the time of his purchase, unless it shall appear that the grantee in such conveyance or person to be benefited by such charge, was party or privy to the fraud intended."

Rev. Stat., c. 65.

Mansfield's Dig., sec. 3375.

The Revised Statutes contains this provision:

"Section 6. No conveyance required by the provisions of this act to be recorded shall be valid or binding, except between the parties and their legal representatives, until the same shall have been deposited in the recorder's office for record; not even then if shown to be made with intent to defraud prior creditors or purchasers; but shall be void against such prior creditors or purchasers."

Rev. Stat., c. 65, sec. 6, title "Frauds."

This statute still remains in force.

Mansfield's Dig., sec. 3378.

"Section 7. This act shall not extend to any estate or interest in any lands or tenements, goods or chattels, or any rents or profits of the same, which shall be upon valuable consideration and *bona fide* and lawfully conveyed; nor shall this act be construed to avoid any deed or sale to a subsequent *bona fide* purchaser from the grantee for valuable consideration and without any notice of fraud."

Rev. Stat., c. 65.

Mansfield's Dig., sec. 7379.

The legislature on the 19th of December, 1846, passed the following act, which still remains in force:

"No deed, bond or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditor of the person executing such deed, bond or instrument, obtaining a judgment or decree, which by law may be a lien upon such real estate, unless such deed, bond or instrument, duly executed and acknowledged, or approved, as is, or may be, required by law, shall be filed for record in the office of the clerk and *ex-officio* recorder of the county where such real estate may be situated."

Mansfield's Dig., sec. 671.

In Main *v.* Alexander, 9 Ark., 112 (1848), being a contest between an attachment creditor and a mortgagee holding under a mortgage improperly acknowledged though recorded, the court held that under the above statutes actual notice was not a valid equivalent for constructive notice, and upheld the claim of the attaching creditor. (P. 12.)

The next case that came up was Byers *v.* Engles, 16 Ark., 543 (1855), a contest between an execution purchaser

and a prior purchaser holding under an unregistered deed, but of which the execution purchaser had notice before the execution sale. The court held (1) that actual notice is as valid as constructive notice; (2) that the filing of the deed for record at any time before the execution sale was sufficient notice; (3) that possession of the land was actual notice; and (4) that it is a fraud for a creditor to endeavor to apply the property of another to the payment of a debt that he does not owe; and so the decision was against the execution creditor. (P. 15.)

This last principle, as to fraud is supported by authorities almost innumerable. We cite a few:

Kerr, Fraud and Mistake, p. 266, and cases cited.

Priest *v.* Rice, 1 Pick., 166, and cases referred to in note.

LeNeve *v.* LeNeve, 3 Atk., 646; 2 Lead. Cas. Eq., 35.

Merrill *v.* Dawson, Hempst., 563.

Fowler *v.* Merrill, 11 How., 375.

Black *v.* Zacherie, 3 Id., 512.

Bridgewater Iron Co. *v.* Lissberger, 116 U. S., 8.

Mills *v.* Smith, 8 Wall., 27.

Hitz *v.* National Bank, 111 U. S., 728.

McCormick *v.* Grogan, L. R., 4 H. L., 97.

Duke of Leeds *v.* Earl of Amherst, 20 Beav., 239.

(*e*) The rule as to attachments and executions is the same. (P. 19.)

Grubbs *v.* Ellyson, 23 Ark., 287.

Meadow *v.* Wise, 41 Id., 289.

Beard *v.* Wilson, 52 Id., 291.

(*f*) The rule in Byers *v.* Engles has often been affirmed. (P. 24.)

Shinn *v.* Taylor, 28 Ark., 523.

Jackson *v.* Allen, 30 Id., 114.

Pindall *v.* Trevor, 30 Id., 266.

Atkinson *v.* Ward, 47 Id., 540.

Jones *v.* Fletcher, 42 Id., 450.

Wilson *v.* Slaughter, 53 Id., 139.

Williams *v.* McIlroy, 34 Id., 92.

Apperson *v.* Burgett, 33 Id., 336.

Doswell *v.* Adler, 28 Id., 85.

(*g*) The court in both of these cases (Main *v.* Alexander and Byers *v.* Engles) overlooked plain provisions contained in the same act thus construed by it; and which was equally conclusive in both cases. (P. 15.)

(*i*) Though Byers *v.* Engles evidently overruled Main *v.* Alexander, yet the doctrine laid down in the latter case is still adhered to. (Cases cited.) (P. 20.)

(*j*) But the court has limited the application of the rule. (P. 21.)

Martin *v.* Schichtel, 60 Ark., 595.

Stephens *v.* Shannon, 43 Id., 464.

Taliaferro *v.* Barrett, 37 Id., 511.

Memphis Ry. *v.* State, Id., 632.

Applewhite *v.* Mill Co., 49 Id., 279.

Garner *v.* Wright, 52 Id., 385.

(*k*) The same court has often expressed a regret that the rule in Main *v.* Alexander was ever adopted. (P. 22.)

Mitchell *v.* Wade, 39 Ark., 386.

Ford *v.* Burks, 37 Id., 94.

Wright *v.* Graham, 42 Id., 148.

Martin *v.* Ogden, 41 Id., 192.

(*l*) Like regrets have been expressed in other States. (P. 23.)

White *v.* Denman, 1 Ohio St., 110.

Hugus *v.* Robinson, 24 Pa. St., 11.

Davis *v.* Turner, 4 Gratt., 471.

IX. This case falls within exceptions recognized by the same court, and applicable to this case. (Brief, p. 25.)

(*a*)

Haskell *v.* Sevier, 25 Ark., 152.

Hall *v.* Pillow, 31 Id., 32.

Simpson *v.* Shackelford, 49 Id., 63.

McIntosh *v.* Hill, 47 Id., 363.

McRea *v.* Merrifield, 48 Id., 160.

(*b*) Volunteers do not come within the rule. (P. 26.)

Moore *v.* Little Rock, 42 Ark., 66.

Hill *v.* Coolidge, 33 Id., 626.

Taylor *v.* Mississippi Mills, 47 Id., 252.

Ames Iron Works *v.* Kalamazoo Pulley Co., 63 Id., 87.

(*c*) One who purchases under his own execution is charged with all the rights and equities which might be asserted against the defendant in the execution. (P. 28.)

Williams *v.* McIlroy, 34 Ark., 92.

Tennant *v.* Watson, 58 Id., 252.

An attaching creditor before sale cannot stand in any better position than he would occupy if he had bought under an attachment sale.

(*d*) Prior to the above decisions it was held that the maxim *caveat emptor* applied; and that in any case any purchaser under execution got just the estate of the defendant in execution, subject to all equities. (P. 29.)

Byers *v.* Engles, 16 Ark., 543.

Pindall *v.* Trevor, 30 Id., 266.

Pickett *v.* Merchants Nat. Bank, 32 Id., 369.

Watkins *v.* Trapnall, 15 Ark., 73.

Jones *v.* Fletcher, 42 Id., 422.

(*e*) If an attaching creditor buys under his judgment, and it is afterwards reversed, he gets no title. (P. 28.)

Fishback *v.* Weaver, 34 Ark., 569.

Boyd *v.* Roane, 49 Id., 416.

Bank U. S. *v.* Bank of Washington, 6 Pet., 19.

X. As to the rule that when a statute is borrowed from another jurisdiction the legislature is presumed to have intended to adopt decisions previously made construing it. (Brief, p. 30.)

(*a*) The rule is not followed blindly. (P. 30.)

Holliday *v.* Cohen, 34 Ark., 716.

Hunter *v.* Truckee Lodge, 14 Nev., 37.

Morgan *v.* State (Neb.), 71 N. W., 794.

Pease *v.* Peck, 18 How., 599.

Burgers *v.* Seligman, 107 U. S., 33.

Roberts *v.* Bolles, 101 Id., 128, 129.

Penn *v.* Bowler, 107 Id., 541.

Ober *v.* Gallagher, 93 Id., 207.

Gelpcke *v.* Dubuque, 1 Wall., 176.

Whitney *v.* Fox, 166 U. S., 647.

Butz *v.* Muscatine, 8 Wall., 582.

XI. Where the statute does not provide for the registration of a particular species of written instrument, such instrument, being outside of the statute, is nowise affected by it. (Brief, p. 33.)

(*a*) The decision in Watson *v.* Thompson Lumber Co., 49 Ark., 85 (1886), is inconsistent with the whole line of decisions, and is not supported by the authorities cited; which are here reviewed. (P. 35.)

(*b*) The Watson case having called attention to the defect of the registration clause of the mortgage act, the legislature amended that act by adding these words:

"*Provided,* That if the mortgagor is a nonresident of this State the mortgage shall be recorded in the county in which the property is situated at the time the mortgage is executed."

Act of February 5, 1891, Sandels & Hill's Dig., sec. 5090.

On the 3d of February, 1897, Congress passed the following act:

"Section 4742 of Mansfield's Digest of the laws of Arkansas heretofore put in force in the Indian Territory, is hereby amended by adding to said section as follows: *Provided,* That if the mortgagor is a nonresident of the Indian

Territory the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated."

29 Statutes U. S., 510, c. 136.

XII. In Arkansas in case of a sale of personal property its nondelivery to the buyer does not raise a conclusive presumption of fraud. (Brief, p. 39.)

(*a*) Such was the rule in England. (P. 39.)

Notes to Twyne's case, 1 Smith L. C., 33.

Benj., Sales, Bennett's Ed., secs. 485, 489.

Bump, Fraud. Conv., p. 61.

(*b*) Such is the rule in Arkansas. Nondelivery is only a circumstance to be considered on an issue of fraud. (P. 39.)

Field *v.* Simco, 7 Ark., 269.

Cocke *v.* Chapman, Id., 197.

Adler-Goldman Co. *v.* Phillips, 63 Id., 51.

Valley Distilling Co. *v.* Atkins, 50 Id., 291.

Hempstead *v.* Johnson, 41 Id., 192.

Martin *v.* Ogden, 41 Id., 192.

(*c*) The same rule obtains in the Federal courts. (P. 40.)

Huntley *v.* Kingman, 152 U. S., 527.

Warner *v.* Norton, 20 How., 459.

Smith *v.* Craft, 123 U. S., 436.

XIII. Where the conveyance is on condition, as in mortgages, it is in no case necessary that the property shall be delivered. (Brief, p. 40.)

Bump, Fraud. Conv., p. 61 *et seq.*
Edward *v.* Harben, 2 Term, 595.
1 Pow., Mortg., 33 *a.*
Fitzgerald *v.* Beebe, 7 Ark., 319.
Ringo *v.* Woodruff, 43 Id., 489.
Conard *v.* Ins. Co., 1 Pet., 449.
Meeker *v.* Wilson, 1 Gall., 419.
Phettiplace *v.* Sayles, 4 Mason, 312.
Fowler *v.* Merrill, 11 How., 394.
U. S. *v.* Hooe, 3 Cranch, 89.
Hamilton *v.* Russell, 1 Id., 316.
Hempstead *v.* Johnson, 18 Ark., 134.
Jones, Chat. Mortg., sec. 323.

XIV. The decision in Main v. Alexander ought not to be imposed on the inhabitants of the Indian Territory. (Brief, p. 43.)

Judicial conflict on this subject in New York. (P. 45.)

Doane *v.* Eddy, 16 Wend., 523.
Waring *v.* Smith, 2 Barb., Chy., 119.
Butler *v.* Van Wyck, 1 Hill, 456.
Craig *v.* Ward, 9 Johns., 197.
Excelsior Mfg. Co. *v.* Owens, 58 Ark., 556.

XV. The curative act of Congress made the mortgages as valid as against attaching creditors with notice as if they had been duly and legally registered at the time they were actually filed. (Brief, p. 54.)

(*a*) The act is retrospective. (P. 54.)

People *v.* Crennan, 141 N. Y., 239; 36 N. E., 187.

People *v.* Spicer, 99 N. Y., 233.

Sampeyrac *v.* U. S., 7 Pet., 222.

Fowler *v.* Merrill, 11 How., 375.

(*b*) Curative statutes are liberally construed. (P. 54.)

Wilkinson *v.* Leland, 2 Pet., 627.

Larkin *v.* Saffarans, 15 Fed., 150.

(*c*) The power of Congress over the Territories is plenary. (P. 55.)

Mormon Church *v.* U. S., 136 U. S., 42.

Laramie Co. *v.* Albany Co., 92 U. S., 310.

Benner *v.* Porter, 9 How., 242.

McAlister *v.* U. S., 141 U. S., 184.

Shirley *v.* Bowlby, 152 Id., 48.

Koenigsberger *v.* Richmond Silver Mining Co., 158 U. S., 48.

Am. Ins. Co. *v.* Ganter, 1 Pet., 542.

Rogers *v.* Burlington, 3 Wall., 663.

Good *v.* Martin, 95 U. S., 90.

Clinton *v.* Engelbrecht, 13 Wall., 434.

Reynolds *v.* U. S., 98 U. S., 115.

Hornbuckle *v.* Tombs, 18 Wall., 645.

2 Story, Const., secs. 1324, 1325.

(*d*) Specially with regard to the Indian tribes. (P. 56.)

U. S. *v.* Kagama, 118 U. S., 380.

(*e*) The acts of Congress extending the Constitution and Federal laws over the Indian Territory is subject to modification and repeal the same as other statutes. (P. 56.)

Cooley, Const. Lim., 146.

District of Columbia *v.* Hutton, 143 U. S., 18.

(*f*) The curative act applies to pending suits. (P. 56.)

U. S. *v.* Peggy, 1 Cranch., 103.

Sidway *v.* Lawson, 58 Ark., 122; overruling Wright *v.* Graham, 42 Id., 140.

Pelt *v.* Payne (Ark.), 30 S. W., 426.

Cooley, Const. Lim., pp. 469, 442.

Johnson *v.* Richardson, 44 Ark., 372.

Reid *v.* Hart, 45 Id., 50.

In re Hall, 167 U. S., 38.

Tennessee *v.* Sneed, 96 Id., 69.

Perriman's case, 103 Id., 720.

1 Kent, Comm., 455.

(*g*) There is nothing to prevent Congress from passing the curative act. (P. 56.)

Curtis *v.* Whitney, 13 Wall., 70.

Townsend *v.* Townsend, Peck R., 117.

Larkin *v.* Saffarans, 15 Fed., 147.

(*h*) The attaching creditor acquired no vested right which exempts it from the operation of the curative act. (P. 57.)

The attaching creditor acquires no property in the thing attached. (P. 58.).

Ladd *v.* North, 2 Mass., 514.

Bigelow *v.* Wilson, 1 Pick., 492.

Dobbins *v.* Hanchett, 20 Ill. App., 396.

Davidson *v.* Beatty, 3 Har. & McH., 594.

Owings *v.* Norwood, 2 Har. & J., 96.

Millar *v.* Babcock, 25 Mich., 137.

Goddard *v.* Perkins, 9 N. H., 488.

Snell *v.* Allen, 1 Swan, 208.

Starr *v.* Moore, 3 McLean, 354.

Tennant *v.* Watson, 58 Ark., 255.

Atkins *v.* Swope, 38 Id., 536.

Green *v.* Abraham, 43 Id., 420.

Pratt *v.* Law, 9 Cranch, 497.

Steers *v.* Kinsey, 68 Ark., 360; 58 S. W., 1050.

Butler *v.* Pennsylvania, 10 How., 416.

New Orleans *v.* N. O. Waterworks Co., 142 U. S., 88.

Campbell *v.* Holt, 115 U. S., 620.

Randall *v.* Krieger, 23 Wall., 149.

Little Rock *v.* Merchants Nat. Bank, 98 U. S., 314.

St. Louis Ry. *v.* Alexander, 49 Ark., 190.

Porter *v.* Doe, Id., 187.

Files *v.* Fuller, 44 Id., 281.

South Carolina *v.* Gaillard, 101 U. S., 433.

Memphis *v.* U. S., 97 U. S., 293.

Webster *v.* Cooper, 14 How., 488.

Antonie *v.* Greenhow, 107 U. S., 769.

Cooley, Const. Lim., 457.

Conkey *v.* Hart, 14 N. Y., 28.

Haynes *v.* Wady, 73 Mich., 178; 41 N. W., 222.

Bangor *v.* Goding, 35 Me., 73; 56 Am. Dec., 688.

McCardle *Ex Parte,* 7 Wall., 506.

Ry. *v.* Grant, 98 U. S., 398.

Norris *v.* Crocker, 13 How., 438.

Sherman *v.* Grinnell, 123 U. S., 679.

Gurney *v.* Patrick Co., 137 Id., 141.

Morey *v.* Lockhart, 123 Id., 56.

Nat. Bank. *v.* Peters, 144 Id., 570.

Hornthal *v.* Collector, 9 Wall., 560.

Assessor *v.* Osborne, Id., 567.

Campbell *v.* Silver Mining Co., 27 C. C. A., 646; 83 Fed., 643; 8th Circuit.

Mechanics Bank *v.* Union Bank, 22 Wall., 298.

Wilkinson *v.* Leland, 2 Pet., 627.

Curtis *v.* Whitney, 13 Wall., 70.

Vance *v.* Vance, 108 U. S., 514.

Satterlee *v.* Matthewson, 2 Pet., 407.

Watson *v.* Mercer, 2 Pet., 88.

Ins. Co. *v.* Ritchie, 5 Wall., 544.

Norris *v.* Crocker, 13 How., 439.

U. S. *v.* Tyne, 11 Wall., 88.

Baltimore Ry. *v.* Nesbitt, 10 How., 395.

Calder *v.* Bull, 3 Dall., 386.

Randall *v.* Krieger, 2 Dill., 444.

Maynard *v.* Hill, 125 U. S., 210.

Richardson *v.* Bellingham Co., 47 Fed., 854.

Ewell *v.* Daggs, 108 U. S., 150.

Woodruff *v.* Scruggs, 27 Ark., 26.

McCormick *v.* U. S., 2 Ohio, 74.

Bangor *v.* Golding, 35 Me., 73; 56 Am. Dec., 688.

Essex Board *v.* Skinkle, 10 Id., 334.

Sturgis *v.* Crowninshield, 4 Wheat., 201.

Van Hoffman *v.* Quinby, 4 Wall., 553.

Hynson *v.* Taylor, 3 Ark., 555.

Edwards *v.* Cooper, 28 Id., 469.

Watson *v.* Ry., 47 N. Y., 157.

(*i*) Courts of chancery cannot, in correcting mistakes in written documents, divest vested rights. (P. 68.)

Davidson *v.* Davidson, 42 Ark., 362.

Woodworth *v.* Cook, 2 Blatchf., 151; 30 Fed. Cas., p. 561.

Gibson *v.* Cook, 2 Blatchf., 144; 10 Fed Cas., p. 314.

Moloney *v.* Rourke, 100 Mass., 190.

Green *v.* Abraham, 43 Ark., 624.

But the Supreme Court of Arkansas has held that such correction might be made against a purchaser with notice.

Simpson *v.* Montgomery, 25 Ark., 365, 372.

Against a purchaser under execution having notice. (P. 68.)

Stewart *v.* Pettigrew, 28 Id., 372.

Blackburn *v.* Randolph, 33 Id., 126.

Allen *v.* McGaughey, 31 Id., 253.

Williams *v.* McIlroy, 34 Id., 85.

Fort Smith Milling Co. *v.* Mikles, 61 Id., 123.

Against a judgment creditor having a lien. (P. 69.)

Brewster *v.* Clamfit, 33 Ark., 76.

See also

Wadsworth *v.* Wandell, 5 Johns., Chy., 224.

Bernardo Tp. *v.* Stebbins, 109 U. S., 391.

Cooley, Const. Lim., p. 457.

(*j*) The moral aspect of the case is not only important; it is decisive. No one has a vested right to do wrong. (P. 61.)

Freeland *v.* Williams, 131 U. S., 405.

Foster *v.* Essex Bank, 16 Mass., 245.

Freeborn *v.* Smith, 2 Wall., 160.

Sampeyrac *v.* U. S., 2 Pet., 222.

Goshorn *v.* Purcell, 11 Ohio St., 78.

Trustees *v.* McCaughey, 2 Id., 155.

Beard *v.* Dansby, 48 Ark., 184.

Leighton *v.* Young, 52 Fed., 444; 18 L. R. A., 266.

Phillips, Mech. Liens, sec. 23.

Best *v.* Baumgardner (Penn.), 15 Atl., 691.

Providence Inst. *v.* Jersey City, 113 U. S., 145.

Bolton *v.* Jones, 5 Pa. St., 145; 47 Am. Dec., 404.

South Carolina *v.* Gaillard, 101 U. S., 433.

National Bank *v.* Reithman, 79 Fed., 582, 8th Circuit.

Tennessee *v.* Sneed, 96 U. S., 69.

Perriman's case, 103 Id., 720.

1 Kent, Comm., 455.

(*k*) As to curative acts "the question is one of reasonableness." (P. 74.)

Terry *v.* Anderson, 95 U. S., 80.

State *v.* Newark, 25 N. J. L., 197.

(*l*) As the plaintiff in error does not claim as against the intervener under any contract, it is clear that his lien does not give him any vested right. (P. 74.)

Louisiana *v.* Mayor of New Orleans, 109 U. S., 285.

Louisiana *v.* St. Martin's Parish, 111 Id., 716.

Freeland *v.* Williams, 136 Id., 405.

Chase *v.* Curtis, 113 Id., 463, 464.

Wisconsin *v.* Ins. Co., 127 Id., 292.

(*m*) It is only when a right of action is based on a contract that has been so far perfected that "nothing remains to be done by the party asserting it," that it can become vested. (P. 75.)

Steamboat Co. *v.* Joliffe, 2 Wall., 457.

Freeland *v.* Williams, 136 U. S., 405.

Chase *v.* Curtis, 113 Id., 463, 464.

(*n*) A judgment is not a contract. (P. 75.)

Morley *v.* Ry., 146 U. S., 162.

Louisiana *v.* Mayor, 109 Id., 288.

Garris *v.* New York, 21 Wall., 203.

XVI. The dissenting opinion of his honor, Judge Sanborn. (P. 76.)

(*a*) Seizure under attachment does not affect the title. (P. 76.)

Merrick *v.* Hall, 15 Ark., 344.

High, Inj., secs. 1, 5.

(*b*) The lien is only "a security against purchasers and incumbrancers." (P. 77.)

4 Kent, Comm., *436.

Hackett *v.* Callender, 32 Vt., 108; overruling Bigelow *v.* Topliff, 25 Id., 273.

Jones, Liens, sec. 12.

Perrin *v.* Reed, 35 Vt., 8.

Drake, Attachm., secs. 223, 245.

Hart *v.* Farmers Bank, 33 Id., 253.

(*c*) The interest of a mortgagor in chattels cannot be levied on. (P. 77.)

Jennings *v.* McIlroy, 42 Ark., 236.

Buck *v.* Bransford, 58 Id., 291.

Cox *v.* Harris, 64 Id., 214.

(*d*) No fraud, actual or constructive, is alleged or shown. Defendant in error is both a *bona fide* purchaser for value and a creditor. (P. 80.)

Roberts, Fraud. Conv., p. 30.

(*e*)

Farguson *v.* Edrington, 49 Ark., 214.

Gerson *v.* Pool, 31 Id., 85.

Kesner *v.* Trigg, 98 U. S., 50.

(*f*) The assertion that the judgment by default against Blocker precludes the intervener is wholly unsupported by the authorities. (P. 81.)

Waples-Platter Co. *v.* Low, 54 Fed., 95; opinion by Sanborn, J.

Huiscamp *v.* Moline Wagon Co., 121 U. S., 319.

(*g*) Since all of the money invested in the purchase of the cattle was advanced by defendants in error it is impossible to say that plaintiff in error has been injured in any manner. (P. 86.)

XVII. All of the questions arising in this controversy were decided in our favor upon precisely the same statutes in the case of Fowler v. Merrill, 11 How., 375 (1850), more than fifty years ago; and that decision has never been overruled, or even criticised. (Brief, p. 87.)

We note the following *errata* in former brief:

Page 10. *Walker v. Collins,* should read 59 Fed.

Page 75. *Morley v. Ry.,* should read 146 U. S., p. 162.

Supreme Court of the United States.

No. 217.—October Term, 1901.

W. P. McFaddin and McFaddin's Executors, Plaintiffs in Error, vs. The Evans-Snider-Buel Company et al.	In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[May 19, 1902.]

In the United States Court for the Northern District of the Indian Territory, in April, 1897, an issue was tried between the Evans-Snider-Buel Company, a corporation organized under the laws of the State of Illinois, and William McFaddin & Son. One J. R. Blocker was the owner and in possession of 6,775 head of cattle pasturing in the Indian Territory. McFaddin & Son were judgment creditors of Blocker, and, as such, levied an attachment on said cattle. The Evans-Snider-Buel Company filed a proceeding by way of interpleader in the attachment suit, claiming to have a prior lien on said cattle by means of certain mortgages given by said Blocker, who, as shown by the mortgages themselves, as well as the testimony in the case, was a resident of Bexar County, Texas, in which county some of the mortgages relied on had been duly executed and recorded. The cattle in question were grazing in the Creek Nation, Indian Territory, and the mortgages were again recorded in the Northern District of the Indian Territory, at Muskogee and in the Creek Nation. The cattle at the time of the levy were in the possession of Blocker, the mortgagor.

After the filing of the interpleader, and on January 29, 1897, a judgment was entered against the defendant Blocker, in the sum of $55,875.71, and sustaining the attachment. There were several trials in the case, but at the last trial in the Northern District, where the plaintiffs, McFaddin & Son, for the second time lost their suit, it was agreed that in case the judgment should be reversed by the United States Court of Appeals for the Indian Territory, judgment should be rendered against the Evans-Snider-Buel Company, the interpleader. The judgment was reversed by that court, and, pursuant to said agreement, on the 4th day of January, 1900, judgment was entered against the interpleader and its bondsmen for the sum of $72,250.35. From that judgment the interpleader prosecuted its writ of error to the United States Court of Appeals for the Eighth Circuit.

At the time the attachment was levied upon the cattle in controversy the following laws in relation to the registration of chattel mortgages were in force in the Indian Territory, being sections 4742 and 4743 of Mansfield's Digest:

"SEC. 4742. All mortgages, whether for real or personal estate, shall be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proved or acknowledged; and when so proved or acknowledged shall be recorded—if for lands, in the county or counties in which the lands lie, and if for personal property, in the county in which the mortgagor resides.

"SEC. 4743. Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property, from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

As before stated, the attachment in this case was sustained on the 29th day of January, 1897. On February 3, 1897, Congress amended the law above quoted by an enactment which reads as follows:

"Section 4742 of Mansfield's Digest of the Laws of Arkansas, heretofore put in force in the Indian Territory, is hereby amended by adding to said section the following: Provided, that if the mortgagor is a non-resident of the Indian Territory the mortgage shall be recorded in the judicial district in which the property is situated at the time the mortgage is executed. All mortgages of personal property in the Indian Territory heretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed are hereby validated." (Stat. 1896–7, p. 510.)

On November 19, 1900, the United States Circuit Court of Appeals for the Eighth Circuit filed an opinion and judgment, Sanborn, J., dissenting, reversing the judgment of the United States Court of Appeals in the Indian Territory, and affirming the judgment of the United States Court for the Northern District of the Indian Territory. Whereupon a writ of error was allowed and the cause brought to this court.

Mr. Justice SHIRAS delivered the opinion of the Court.

The controversy in this case is between mortgagee creditors and judgment creditors of John R. Blocker. The mortgages were given to secure the payment of notes executed by Blocker to the amount of about $130,000, which were held by the Evans-Snider-Buel Company, and represented money that had been advanced by that company to Blocker to enable him to purchase the cattle embraced in the mortgage. The mortgages were recorded, within a day or two after their execution, in the clerk's office of the United States Court for the Northern District of the Indian Territory, that being the district in which the mortgaged property was situated.

William McFaddin & Son had obtained a judgment against Blocker in Jefferson County, Texas, in May, 1887, and on June 17, 1896, they sued

out an attachment on that judgment in the United States Court for the Northern District of the Indian Territory, and levied on the cattle described in the mortgages.

It is not denied that McFaddin & Son had actual knowledge of the existence of the mortgages at the time they sued out their writ of attachment. Indeed, it appears that the description of the cattle was taken by their attorneys from the record of the mortgages before the attachment was issued.

But it is claimed that, under the laws of the State of Arkanas, in force by act of Congress in the Indian Territory, as construed by the Supreme Court of Arkansas, the mortgages as recorded did not constitute a lien on the property described as against third parties, although they had actual notice of their existence, and that as McFaddin & Son had levied their attachment and obtained judgment against Blocker before the act of Congress of February 3, 1897, validating the mortgages and their record, was passed, such legislation was invalid and ineffectual to postpone the lien of the attachment and judgment to the lien of the mortgages.

Elaborate arguments, oral and written, have been advanced, *pro* and *contra*, on the propositions that an attaching creditor is not a purchaser for value; that an unrecorded deed or mortgage creating a lien will take precedence over a subsequent attachment; that notice to a subsequent purchaser of an unrecorded mortgage is conclusive evidence of *mala fides* on his part; that a chattel mortgage, not fraudulent as to creditors, made in good faith to secure an honest debt, is at common law superior to a subsequent attachment of the same property by a creditor of the mortgagor; that actual notice is equivalent in law to constructive notice. But as we are of opinion that the judgment of the Circuit Court of Appeals, sustaining the validity of the act of Feburary 3, 1897, as applicable to the present case, is sound, we do not consider it necessary to discuss the other propositions urged upon us by the counsel of the defendants in error.

The Fifth Amendment to the Federal Constitution, which declares that "no person shall be deprived of life, liberty or property without due process of law," is a limitation on the power of Congress, and the question is open whether the act in question, held applicable by the Circuit Court of Appeals to the present case, deprived the plaintiffs in error of property within the meaning of that amendment.

We think it is impossible to successfully contend that the act of Congress, when it in terms declared that "all mortgages of personal property in the Indian Territory *heretofore* executed and recorded in the judicial district thereof in which the property was situated *at the time they were executed*, are *hereby* validated," can be construed as intended to apply only to mortgages made *after* the passage of the act, and had no retroactive effect. Such a construction was adopted by the Court of Appeals of the

Indian Territory, and was approved by the dissenting judge in the Circuit Court of Appeals for the Eighth Circuit. But the language of the enactment is too express to permit such a view. The plain purpose of Congress was to give effect to mortgages of non-residents which had been, *before* the passage of the act, recorded in the judicial district in which the property was situated at the time the mortgages were executed.

We think, therefore, that the trial court and the Circuit Court of Appeals were right in holding that the act of February 3, 1897, was applicable to the mortgages of the defendants in error, and we are to inquire whether the act, as so construed and applied, was a valid exercise of Congressional power.

The contention on behalf of the plaintiffs in error is that by the judgment in default against Blocker on January 29, 1897, they obtained a vested interest in the cattle seized under the writ of attachment, which could not be impaired by the subsequent legislative enactment of February 3, 1897.

But it is to be observed that the only issues determined by that judgment were those between McFaddin & Son, the attaching creditors, and Blocker, the judgment debtor. Thereby any controversy as to the indebtedness and the existence of proper grounds of attachment were, as to those parties, concluded. But this judgement by default did not preclude the Evans-Snider-Buel Company from denying the right of the attaching creditors to a lien prior to that of the mortgages. That was an issue that was still pending and undetermined when the act of February 3, 1897, was approved. Accordingly, when the issue between the two classes of creditors came on to be tried in the United States Court for the Northern District of the Indian Territory the only question was as to the priority of the respective liens. It was not denied that the mortgages constituted valid liens as against Blocker, the mortgagor, nor was it denied that the mortgages had been recorded in the district in which the mortgaged property was situated, before the attachment was levied on the mortgaged property. That the money secured by the mortgages was advanced to Blocker and used by him in the purchase of the cattle, and that the attaching creditors had actual knowledge of the existence of the mortgages before they sued out the writ of attachment, were also admitted facts.

What was claimed was, that the record of the mortgages was ineffective as notice thereof to the attaching creditors, because the mortgagor was a non-resident of the Indian Territory when the mortgages were given, and that, under the registry law then in force, the mortgages of a non-resident, though in fact recorded, did not constitute liens as against third parties.

To this contention the mortgagees pleaded the curative act of February 3, 1877, whereby it was provided that mortgages of non-residents of the Indian Territory should be recorded in the judicial district in which the

property was situated, and that all mortgages of personal property in the Indian Territory theretofore executed and recorded in the judicial district thereof in which the property was situated at the time they were executed were thereby validated.

As we have already stated, the trial court and the Circuit Court of Appeals of the Eighth Circuit held that the act of February 3, 1897, was applicable to the case in hand, and, as a valid exercise of power, was decisive of the controversy.

The condition of the plaintiffs in error is very different from that of a purchaser for a valuable consideration without notice of an alleged prior incumbrance. It cannot be said that they parted with any money or other valuable consideration in reliance upon the disclosures of the registry record. The indebtedness of Blocker to them had accrued years before; and if the record did not, under the decisions of the Arkansas Supreme Court, give them constructive notice of the existence of the mortgage debts, it is admitted to have given them the actual knowledge upon which they proceeded in suing out the writ of attachment. The judgment in their favor in the attachment suit, though conclusive as against Blocker, gave them no property rights in the cattle as against the mortgagees, and if their attempt to appropriate the mortgaged property is defeated, they are in no worse position than if the defendants in error had not advanced the money with which the cattle were purchased. If the problem were made to turn upon the equities between the two classes of creditors, the solution would be an easy one. With the legal title to the property in the common debtor, no court of equity would prefer the lien of a mere attachment to that of a prior mortgage given to secure the money advanced to purchase the property, if the attachment creditor had actual knowledge of the existence and nature of the mortgage.

And we agree with the Circuit Court of Appeals, that while it is not necessary to enter into the question of the comparative equities of the parties, yet, when the validity of the curative act is to be passed upon, that, in circumstances like those of the present case, the act cannot be justly impugned as depriving the attaching creditor of property within the meaning of the Constitution.

In *Freeborn* v. *Smith*, (2 Wall. 160,) the facts were these: Smith had obtained a judgment against Freeborn in the Supreme Court of the Territory of Nevada. To this judgment a writ of error went from this court, under the law organizing the Territory, and the record of the case was filed in this court, December term, 1862. After the case was thus removed the Territory was admitted by act of Congress, March, 1864, into the Union as a State. The act admitting the Territory contained, however, no provision for the disposal of cases then pending in this court on writ of error or appeal from the Territorial courts. Motion was made,

in behalf of the defendants in error, to dismiss the writ, on the ground that the Territorial government having been extinguished by the formation of a State government in its stead, and the act of Congress which extinguished it having, in no way, saved the jurisdiction of the court as previously existing, nothing further could be done here. It was urged that the Territorial judiciary had fallen with the government of which it was part; and that the jurisdiction of this court had ceased with the termination of the act conferring it. It being suggested, on the other side, that a bill was pending in Congress supplying the omissions of the act of March, 1864, the hearing of the motion for dismissal was suspended till it was seen what Congress would do. Congress finally acted, and on February 27, 1865, passed an act providing that all cases of appeal or writ of error theretofore prosecuted, and then pending in the Supreme Court of the United States from the Supreme Court of the Territory of Nevada, might be heard and determined by the Supreme Court of the United States, and providing for mandatory process, &c. The motion to dismiss the writ for want of jurisdiction was then renewed, on the ground that the amendatory act was a retrospective enactment interfering with vested rights, and as an attempt to confer on this court jurisdiction to review a judgment which, by law, at the time of its passage, was final and absolute. This court, through Mr. Justice Grier, thus disposed of the contention:

"It is objected to the act of February 27, just passed, that it is ineffectual for the purpose intended by it; that it is a retrospective act, interfering directly with vested rights; that the result of maintaining it would be to disturb and impair judgment which, at the time of its passage, were final and absolute; that the powers of Congress are strictly legislative, and this is an exercise of judicial power, which Congress is not competent to exercise.

"But we are of opinion that these objections are not well founded. . . . What obstacle was in the way of legislation to supply the omission to make provision for such cases in the original act? If it comes within the category of retrospective legislation, as has been argued, we find nothing in the Constitution limiting the power of Congress to amend or correct omissions in previous acts. It is well settled that where there is no direct constitutional prohibition, a State may pass retrospective laws, such as, in their operation, may affect suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of legal proceedings. . . . Such acts are of a remedial nature, and are the peculiar subject of legislation. They are not liable to the imputation of being assumptions of judicial power."

The power of a legislature to pass laws giving validity to past deeds which were before ineffectual is well settled. Thus in *Watson* v. *Mercer*, (8 Pet. 100,) the title to land in controversy was originally in Margaret Mercer, the wife of James Mercer. For the purpose of transferring the title to the husband, they conveyed to a third person, who immediately conveyed to James Mercer. The deed of Mercer and wife bore date of May 30,

1785. It was fatally defective as to the wife, in not having been acknowledged by her in conformity with the provisions of the statute of Pennsylvania of 1770, touching the conveyance of real estate by *femes covert.* She died without issue. James Mercer died leaving children by a former marriage. After the death of both parties, her heirs sued his heirs in ejectment for the premises, and recovered. The Supreme Court of the State affirmed the judgment. In 1826 the legislature passed an act which cured the defective acknowledgment of Margaret Mercer, and gave the same validity to the deed as if it had been well executed originally on her part. The heirs of James Mercer thereupon sued her heirs and recovered back the same premises. This judgment was also affirmed by the Supreme Court of the State, and that judgment of affirmance was affirmed by this court.

Watson v. *Mercer* was cited and followed by this court in *Randall* v. *Kreiger,* (23 Wall. 137,) where it was held that it was competent for the legislature to validate a defective power of attorney to convey land.

Similar principles were recognized in *Terry* v. *Anderson,* (95 U. S. 628;) *Freeland* v. *Williams,* (131 U. S. 405;) *Baker's Executors* v. *Kilgore,* (145 U. S. 487;) *Louisiana* v. *New Orleans,* (109 U. S. 285.) The case of *Green* v. *Abraham,* (43 Ark. 420,) was cited in the opinion of the Circuit Court of Appeals. There a mortgage improperly acknowledged had been placed of record, which by reason of the defective acknowledgment was not notice to subsequent purchasers or lienors. Afterwards the mortgaged property was attached under a writ against the mortgagor, and thereafter the legislature validated the record of the mortgage. The mortgagee having proceeded in replevin to recover the attached property from one who claimed it under the attachment, it was held by the Supreme Court of Arkansas that the interest of the attaching creditor in the attached property was not vested, but could be, and that it was in fact displaced by the subsequent enactment validating the record of the mortgage.

Without pursuing the subject further, our conclusion is that no property rights of the plaintiffs in error were impaired by the act of February 3, 1897. Their judgment against Blocker remained unaffected, and the lien of the writ of attachment was not destroyed, but continued to hold any surplus that might have remained after the satisfaction of the mortgage liens. They have no just ground in constitutional law to complain of the action of Congress in giving legal effect to the equitable lien of the mortgages.

Approving the careful opinion of the Circuit Court of Appeals for the Eighth Circuit, reported in vol. 105 Fed. Rep. 293, the judgment of that court is *Affirmed.*

Mr. Justice GRAY and Mr. Justice WHITE took no part in the decision.